Collectanea Juridica.

CONSISTING OF

TRACTS,

RELATIVE TO THE

LAW AND CONSTITUTION

OF

ENGLAND.

VOLUME THE SECOND.

SPARSA COLLIGIMUS.



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CONTENTS.

MOND,

No. I.

A TREATISE *of the* COURT *of* STAR CHAMBER *.

PART THE FIRST.

§. I. THE DIVISION OF THE TREATISE.

I CANNOT but with admiration reverence the grave judgment of the sages of the common law of England who have been abstinent in publishing their meditations and arguments in their professions, either holding it as a flag of vain-glory unworthy their gravity, or as one of Lycurgus' maxims, or their ancestors' Druides' prescripts, *mandare memoriæ, et disciplinæ potiùs quàm scriptis*; unlike to this cracking age, when all men in all professions *quicquid subitò crepant omnino à flatu Apollinis credunt*; who, for fear of burying their talent, post to the press to publish to others that which they well understand not themselves; it being assuredly no matter of necessity to publish the rea-

* A MS. copy of this Treatise, Harl. MSS. No. 1226. contains the following memorandum:

" This Treatise was compiled by William Hudson, of Gray's Inn, esq.
" one very much practised, and of great experience in the Star Chamber,
" and my very affectionate friend. His son and heir, mr. Christopher
" Hudson (whose hand-writing this book is), after his father's death,
" gave it to me 19 Dec. 1635.

" JO. FINCH,"
Ch. Just. C. P. 11. Car. 1.
Ld. Keep. Gr. Seal, 15. Car. 1.

Lord Mansfield quotes this MS. in the Case of the King *v.* Wilkes, (4. Burrow 2554.) and states the passage relating to the power of the king's attorney general, which is hereafter pointed out in PART III. §. 4.

PART I.

ſons of the judgment of the law, or *apices or fictiones juris* to the multitude, who are apt to furniſh themſelves with ſhifts to cloak their wickedneſs, rather than to gain underſtanding to further the government of the Commonwealth: for ſurely few men would be ruinated by diſhoneſt means, if men knew not how to cover their diſhoneſty under ſome colour of law or juſtice; a kind of ignorance for which an old hiſtoriographer commended the Scythians, affirming, that *plus apud illos profuit ignorantia quàm apud Græcos divinarum atque humanarum rerum ſcientia.* But, amongſt that which is written of the common laws of England, I find little mention made either in the reports or treatiſes of the law concerning the great and high Court of Star Chamber, except now and then (*ſparſim*) ſome one or two caſes in an age; mentioned rather, as it ſeemeth, to manifeſt to poſterity that there was ſuch a court, than to enlighten the world with the radiant beams of thoſe bright ſhining ſtars, as the cynoſure to ſteer and direct a ſure courſe of the happy government of this ſtate in peace and glory. Only ſir *Thomas Smyth*, in his "*Commonwealth*," hath glanced by it; and mr. *Lambert*, the great antiquary of this time, hath taken great pains to ſet forth the lawful power, authority, and juriſdiction of this court; and mr. *Crompton* hath collected many particular caſes there properly examinable.

But by reaſon that I conceive mr. *Lambert* hath erred in ſome things, and the reſt are defective in that which is moſt material, I will, by the help of Almighty God, endeavour, with as much brevity as I can, to ſet forth, as in a model, the compoſition and juriſdiction of that high court, ſo far forth as, by my weak obſervations and labours for the ſpace of twenty years, I could attain unto. And to this end and purpoſe, that I may more plainly expreſs myſelf, I will divide the Treatiſe into Three ſeveral and diſtinct Parts.

1. THE

1. THE First shall be concerning the court itself; the judges, officers, and ministers thereof. PART I.

2. THE Second, concerning the jurisdiction of the same, and the causes which are there handled and properly determinable.

3. THE Third, and last, concerning the course of the same court; in what form causes are proceeded in, and there determined.

THE last whereof I should be more bold to enlarge upon, for that no man heretofore hath ever taken any pains or regard to make observation of the same more than for his own private use and particular practice.

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§. II. THE COURT OF STAR CHAMBER IS A SETTLED ORDINARY COURT OF JUSTICE.

AND in the FIRST PART of this TREATISE concerning the Court of Star Chamber, I will content myself to handle, amongst other things which might fitly be debated, these heads: First, That it is an ordinary court of justice. Secondly, The name of the court. Thirdly, The antiquity thereof. Fourthly, The dignity thereof. Fifthly, The presence thereof. Sixthly, The officers thereof.

AND concerning the first point, I shall meet with two several contentions.

1. THE one is, that this court is but an usurpation of monarchy upon the common law of England, and in prejudice of the liberties granted to the subject by the Great Charter, especially where persons are produced, without legal prosecution to punishment, at the bar without oath or testimony.

2. THE other, that it is no settled ordinary court of judicature, but only an assembly for a consultation at the king's command, upon some urgent occasions, in cases where all other courts want power for want of law to warrant them, or have no weight sufficient to poise the question.

CONCERNING the firſt, I well remember that mr. *Carew, Paſch.* 1. *Jacobi*, being produced *ore tenus* for an audacious part in ſhutting up his pariſh-church-door, denying the Common Prayer to be uſed according to the form eſtabliſhed in the reign of queen Elizabeth, did, at his defence of the crime, deliver into court that part of *Magna Charta, Nullus liber homo capietur vel impriſonetur aut diſſeiſietur de libero tenemento ſuo vel de libertatibus vel liberis conſuetudinibus ſuis, vel utlagetur vel exuletur aut aliquo modo diſtruatur, nec ſuper eum ibimus nec ſuper eum mittemus niſi per legale judicium parium ſuorum, vel per legem terræ.* But the grave lord keeper *Egerton*, well weighing that it was not only neceſſary to proceed to the cenſure of the gentleman at that time, but to give ſatisfaction to the world that the proceedings in that kind were juſt and legal, did learnedly declare the true meaning of that law, ſhewing the disjunctive *per legale judicium parium ſuorum*, which was by indictment, or ſome writ original, *vel per legem terræ.*

AND that the law of England had always as well an extraordinary and expeditious court to conſerve the peace of the kingdom, as an ordinary form of proſecution, where the bleeding ſtate required not ſpeedy remedy; and for the courſe of calling men to anſwer to a ſuggeſtion in that court by privy ſeal or *ſubpœna*, and proceeding thereupon in the antient form; mr. *Keeble, in temp. H.* 7. in his reading upon this law plainly declareth, that a privy ſeal is in the nature of an original writ, and ſo that courſe of proceeding not diſſonant from the act of parliament.

THESE judicial opinions, both of antient and modern times, together with the continual uſage in the reign of all the kings of this land in ſucceſſion; and that the king, who is the fountain of all juſtice, muſt neceſſarily, by the law, have power to execute juſtice himſelf, which he doth moſt properly in this court, as ſhall be hereafter declared at large; ſhall be ſufficient to ſatisfy

satisfy every indifferent man concerning the first point, that this court hath not encroached upon the common law, or any way opposeth the liberties of the Great Charter. PART I.

FOR the second point, I would fain know what there wanteth in this court to decypher it to be an ordinary court of judicature which any other court at Westminster hath? It hath judges, ordinary process, officers, a place certain, a continued session in the term time, and day given over from time to time. So you shall find it in the reign of *H.* 7. and *H.* 8. as well as now and then more continual without days of intermission, whereas now the court sitteth ordinarily but two days in the week, the same then sitting, for the most part, every day of the week.

BUT it is objected, that the usual courts of justice do only sit in the term time, and this court sitteth at the king's pleasure, as well in vacation as term; for so it did at Davison's sentence in the reign of queen Elizabeth, and in the great Dutch cause in the reign of our now sovereign; which manifesteth it to subsist rather by extraordinary sovereignty than ordinary course. To this I answer, that the extraordinary prerogative which that court hath, taketh not away the ordinary stability; for the chancellor of England may determine cases in the court of chancery in the vacation time as well as in the term. And the chancellor and lord keeper have ever so done; yet no man will deny the court of chancery to be an ordinary court of justice.

AGAIN, It is objected, that the pleadings in the court and the records thereof are not tied unto any such formality, or preserved with so much care, nor entered upon any adjournment and continuance with so much strictness and diligence, as other courts at Westminster; and therefore it seemeth, that this great court hath rather been as a committee for such great causes as it pleased the king than as a court of ordinary justice, which is ever tied to form, as to the chief principle which giveth it being.

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PART I. 'Whereunto I give this anſwer: That there is no court in Weſtminſter-hall which doth ſo ſharply correct the neglect of convenient form in him which complaineth, as this court, thereby to put ſufficient certainty to the matter fit for the judgment of this court, diſcharging the parties with coſts double to expence. But the gravity of this court contemneth to give allowance to every cavillation, and that upon great and good grounds; for it would but protract and delay him which complaineth, and protect him that is an offender, by which the Commonwealth ſhould receive prejudice; for *intereſt reipublicæ ne delicta maneant impunita*: and therefore the lord chancellor Egerton, with great wiſdom, denied to give allowance to the frivolous exceptions to bills at the hearing, as injurious to the ſubject and prejudicial to the ſtate; of which I ſhall more fitly ſpeak hereafter.

But for the cuſtody of records, howſoever in theſe latter times they may be neglected, for that ſome great men have delivered their opinions that it were no great matter whether any pleading remained or not after the cauſe heard, becauſe the judgment cannot be reverſed by error; and cauſes have, upon deliberation, been ordered to proceed to hearing upon copies, the original being withdrawn by neglect, and no care taken to have them engroſſed *de novo*, and orderly filed: ſo alſo the very ſentences by which ſevere puniſhment hath been executed upon offenders have, by mere neglect, been wholly left unentered; ſo that there is no record to juſtify the inflicting of that puniſhment: howſoever, I ſay, this negligence hath crept into the court of very late time, either in mr. Mills's age, or ſince the office hath been executed by many deputies, one being thruſt out by that time he underſtandeth the duties of the place, and another put in altogether unexperienced; yet in former times the judgments before the king and his council were kept in ſuch care, and remain in ſuch order, as no records of

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the kingdom are of more uſe than thoſe remaining in the Tower of London; many particulars of which I ſhall have occaſion to remember, hereafter.

AND for the continuances, whoſoever will be pleaſed to look over the records of the reigns of king *H.* 7. and *H.* 8. they ſhall find all the rules and orders there entered in Latin, and the continuances of caſes entered from term to term, ſometimes with a clauſe of aſſent of the parties, ſometimes *per ordinem cancellarii.* And in thoſe times matters of ſmalleſt moment were obſerved with a great deal of ſtate; as, that the appearance was recorded before the lord chancellor and preſident of the council; ſometimes in the chancellor's houſe, ſometimes in the parliament chamber, ſometimes in the inner ſtar chamber, ſometimes in the court; all which gave majeſty to the court and terror to the offenders. It is now deſcended to ſo mean a ſtep as that the appearance is taken only by an inferior clerk, and not ſo much as by the deputy clerk of the court: a groſs error, and firſt uſed by mr. Mills in his age, by reaſon the other hath part of the fee, and is ſince carried as a particular office, and executed by an inferior clerk, wherein there is no obſervation of ſtate or majeſty worthy of the dignity of that great high court.

BESIDES, one great inconvenience thereby enſueth, for that in great offences the offender *flagrante crimine* is ſtricken with amazement, and then coming before a grave and reverend perſon, truth is eaſily won from him, which after the party be hardened will never be gained. And this I have obſerved upon peruſal of the records of *H.* 7. to have been before the then lord chancellor, as it is to be ſeen in one *Maylin*'s caſe about the 11th of *H.* 7. and thereupon the party was bound to appear *de die in diem*, or confeſs the offence; and that this court hath had a certain place or reſidence in *Camera Stellata*, than which no court of England can be more aſcertained in place. And this ſhall ſuffice in this ſhort

PART I. discourse to manifest that the Court of Star Chamber, although an high court, yet it is an ordinary court of justice in this kingdom.

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§ III. THE NAME OF THE COURT.

HAVING now named *Camera Stellata*, methinks that I should begin as *Plutarch* does his "*Romulus*," *magnum illud Romæ nomen à quo inditum*, &c.; and so it hath been a great and large question, Whence this name Star Chamber had its original? Some think it is so called of *Crimen Stellionatus*, because it handleth such things and cases as are strange and unusual: some of *Stallen*. I confess I am in that point a Platonist in opinion, that *nomina naturâ fiunt potiùs quam vagâ impositione*; for assuredly Adam, before his Fall, was abundantly skilful in the nature of all things; so that when God brought him all things to name, he gave them names befitting their natures. And so I doubt not but *Camera Stellata* (for so I find it called in our antient Year-books) is most aptly named; not because the Star Chamber, where the court is kept, is so adorned with stars gilded, as some would have it; for surely the chamber is so adorned, because it is the seal of that court, *et denominatio* being *à præstantiori magis dignum trahit ad se minus*; and it was so fitly called, because the stars have no light but what is cast upon them from the sun by reflection, being his representative body; and as his majesty himself was pleased to say, when he sat there in his royal person, representation must needs cease when the person is present. So in the presence of his great majesty, the which is the sun of honour and glory, the shining of those stars is put out, they not having any power to pronounce any sentence in this court, for the judgment is the king's only; but by way of advice they deliver their opinions, which his wisdom alloweth or disalloweth, encreaseth or moderateth, at his royal pleasure: which was performed by his most excellent

excellent majesty with more than Solomon's wisdom in that great cause of the *countess of Exeter* against *sir Thomas Lake*; where his majesty, during the dignity of that court, sat five continual days in a chair of state elevated above the table about which his lords sat; and after that long and patient hearing, and the opinions particularly given of his great council, he pronounced a sentence more accurately eloquent, judiciously grave, and honourably just, to the satisfaction of all the hearers, and of all the lovers of justice, than all the records extant in this kingdom can declare to have been, at any former time, done by any of his royal progenitors. To conclude then, I suppose the name to be given according to the nature of the judges thereof, which I hope agreeth with the name of the chancery and other courts of this kingdom. PART I.

§. IV. THE ANTIQUITY OF THE COURT.

I COULD very well take occasion to enlarge my discourse into a greater volume, to set forth the antiquity of this Court of Star Chamber; but so many men have taken pains in this kind, that I may spare much labour and travail therein. There is no man will deny, that in all monarchies the king is the fountain of all justice, to whom is the first refuge of those that are distressed, and the last to whom appeals are to be made. And *Bracton*, father of our laws, who writ in the time of *H.* 3. doth agree it to be the law of England, *Rex et non alius debet judicare, si solus ad id sufficere possit, cùm ad hoc per virtutem sacram teneatur; exercere igitur debet rex potestatem juris, sicut Dei vicarius, et minister in terrâ.* But, as he saith, *si dominus rex ad singulas causas determinandas non sufficiat, ut levior sit illi labor, in plures personas partito onere, eligere debet viros sapientes et Deum timentes.* And Britton, who writ in

PART I. in *E.* 1. beginneth his treatise to the same purpose, and concludeth (writing in the king's name), "We will, that "our own jurisdiction be above all jurisdictions, in all cases "real and personal."

Admitting then the king to be supreme judge of all, and sitting in his throne of majesty with his wise men and sages, distributing justice in his royal person, or by his council, and that, finding himself and them overcharged, he hath therefore committed the pleas of the crown to certain judges, matters of common right betwixt party and party to other justices; and to others his revenue; all which, before they were distributed to others, were properly determinable before himself and his council; it must then follow, that all courts of justice have flowed out of this court, as out of a fountain; the king and the council having distributed these causes to substantial judges for the ease of the subjects and themselves; and then this court must be the most antient court of justice, and the mother court of this kingdom: which is the more plainly manifested, for that almost in man's memory the court of requests was instituted by the reference of poor people, and of the king's servants, out of this court, whereby a great part of interest betwixt party and party ceased there to be prosecuted. But to prove by judicial acts and records this court is most antient as it is now established, I mean in the same manner, place, and all circumstances, and not founded by act of parliament in the reign of king *H.* 7.; a doating which no man that had looked upon the records of the court would have lighted upon, it being solemnly adjudged by the chief judges of England, sir Edward Coke and the lord Howard, attended by the king's learned counsel, then sir Francis Bacon and sir Henry Yelverton, in the cause betwixt the *earl of Northumberland* and *sir Stephen Proctor*, and published in open court, that the stat. 3. *H.* 7. extended not any way to this court, but that the lords authorised by that act may at all times, in all places, determine of the

matters

matters therein ſpecified; for manifeſtation whereof it appeareth plainly in our books of common law, when courts of juſtice are antiently divided into baſe courts and the king's courts, the baſe court is hallimott, or court baron, leet, hundred court, and ſheriff's tourn; the king's court was only a ſuperior court of juſtice, whither, by reaſon of the miniſtry or the weightineſs of the cauſe, ſuits were exhibited to the king in perſon. And long before the Norman Conqueror king Edgar made a law, that no man ſhould ſeek to the king, unleſs he could not find right at home; and the like law was afterward confirmed by Canute; which proveth expreſsly, that antiently, before the Conqueſt, the king and his council determined weighty cauſes and grievances of the kingdom: and no man will doubt but that the Norman Conqueror and his ſon, being become abſolute monarchs by the ſword, would maintain that judgment ſeat, and, as it is evident, preſſed the people ſo far with the weight of royal prerogative (which is in nothing ſo much exerciſed as in the ſole, ſovereign, and arbitrary adminiſtration of juſtice, which made the people cry out ſo much for the reſtitution of Edward's laws), by which ſome courts of juſtice were eſtabliſhed, all things being then done, judged, and ordered by the will of the ſovereign, as well in civil as in criminal cauſes. But it is more apparent in Henry the Second's time this great court of the king was eſtabliſhed; for Gervaſius Tilburienſis, who dedicated certain Dialogues of the Obſtruation of the Exchequer to Henry the Second, hath theſe words, as mr. Lambert remembereth: *Nulli licet ſtatuta ſcaccarii infringere vel quâvis temeritate reſiſtere; habet hoc enim quiddam commune cum ipſa domini regis curia in quâ ipſe in propriâ perſonâ jura dicit*, &c. And of what court can this be intended, other than of this great court, I cannot imagine; it being his royal ſeat of juſtice appropriate to his perſon. And in the time of the ſaid king *H.* 2. *Glanvil*, in his preface, doth plainly deſcribe this court. Having ſpoken of the cuſtomary

PART I. tomary laws, he addeth thus: *Quod laudabilius est, talium virorum (licet subditorum) Rex noster non dedignatur consilio, quos morum gravitate, peritiâ juris et regni consuetudinibus, suæ sapientiæ et eloquentiæ prærogativa, aliis novit præcellere, et ad causas mediante justitiâ decidendas et lites dirimendas, nunc severius, nunc mitius agendo, prout viderint expedire, ipsis rerum argumentis, comperit cum ratione promptissimos*; which cannot be intended of any court but this; for the courts of the common law cannot slack or strengthen the reins of justice, but are tied to a strict performance of law by their oath. To descend down to *Edward* 1. the English lawgiver and settler of that free charter, in what place or court do we conceive that just king called his judges and officers to that great account, and set those heavy fines upon them, and removed them, so that he left only one great judge remaining unsentenced as a man of integrity? And in the eighteenth year of his reign an act of parliament was made, that the chancellor and justices of the bench should follow the king wheresoever he went, to the end he might always have at hand learned and able men to advise him in such cases as he admitted to his hearing: and what was this but *coram rege et concilio*? I will not labour much in *Edw.* 2. the times being unfit to make a precedent. But *Edw.* 3.'s time is plentiful of apparent matter, declaring the establishing this court; for by the statute 15. *E.* 2. *c.* 4. and 2. *E.* 3. *c.* 31. it is prohibited, that no man shall be put to answer before the king or his council without presentment before his justices due process, matter of record, or writ original, according to the antient laws; by which it is plain, that men were then put to answer before the king and his council without such lawful process; which surely was the apprehension of the body by pursuivant, and so detaining him from answer for the same before the king: And 40. *E.* 3. the king received the complaint of Elizabeth, wife of Nicholas Studley, and thereupon caused James Studley to appear before his chancellor,

cellor, treasurer, justices, and other sages, assembled in *la chambre de estioles pris de la receipt* at Westminster, being the place where the court is now kept. So that it is apparent that these statutes did not extinguish the power of the court, but the abuse of apprehending mens' persons to answer suggestions; not unlike to process of good behaviour which issueth out of the crown-office, where the articles upon which it is granted rest in secret; the accused party being never called to answer, or given to understand for what reason the process issueth; and many times he lieth in prison for want of sureties till he wasteth his whole estate: as great a grief in our age as the other was in the reign of *E.* 3.; and, as I have formerly declared, the writ of privy seal is to that purpose an original writ. And I must not omit the declaration of the three *corams* in the *twenty-eighth* statute of *Hen.* 5. where *coram nobis et consilio* is resolved to be *coram rege in camerâ*, which hath been so often affirmed by the reverend judge sir Edward Coke.

PART I.

In the time of *R.* 2. it appeareth, that this court continued the wonted prosecution; for by the stat. 27. *R.* 2. *c.* 6. *the chancellor* hath power *alone*, by his discretion, to award damages against any person that should make any untrue suggestion against any other before the king and his council, and had not power to assess damage before that act; for, that if they had not, the king and his council have no power at this time: but we know that our royal king gave 3000l. damages to the countess of Exeter for a slander, and that most justly. And the law of *R.* 2. did only give power to the chancellor alone, that the grieved party might have the more speedy relief from one than from many: by which, it may be noted, the commons seemed to give allowance to this kind of prosecution, although they had in those ill-governed times opposed the very writs now used in this court called *quibusdam certis de causis*, both in 1. *R.* 2. and 13. yet the king still

upheld

PART I. upheld his regality, ſovereignty, and prerogative of judicature.

HENRY 4. obtaining by a popular applauſe the crown of England, the people thought it a fit time to depreſs the kingly authority; and therefore in the parliament 4. *H.* 4. the commons complained that they were unquieted by the writs of *ſubpœna* and letters of privy ſeal, and prayed that the party accuſed might be received to traverſe ſuch ſurmiſes, and to try them by an inqueſt; which if they found for him, they might give damages with regard of his ſlander and coſts; and that the accuſer might make fine and ranſom, and ſuffer impriſonment. The wiſe king, knowing how far it trenched to his royal prerogative, anſwered, that he would give order to his officers to ſtay the frequency of thoſe writs; but not yet ſo that they could not ſend for them in caſes neceſſary, as formerly had been uſed; for if that courſe could have been reſtrained, the common laws had, by the abuſe of officers, and corruption of ſheriffs and jurors, before this time been utterly quaſhed and overthrown, or elſe the Commonwealth utterly ruinated: for when a corrupt jury had given an injurious verdict, if there had been no remedy but to attaint them by another jury, the wronged party would have had ſmall remedy, as it is manifeſted by common experience, no jury having for many years attainted a former. As alſo at this day in the Principality of Wales, if a man of good alliance have a cauſe to be tried, although many ſharp laws have been made for favourable panels, yet it is impoſſible to have a jury which will find againſt him, be the cauſe never ſo plain: or if arraigned for murder he ſhall hardly be convicted, although the fear of puniſhment of this court carrieth ſome awful reſpect over them. Good reaſon then had the kings of this land not to be intreated to part with this jewel, although it hath been ſought in all times of advantage.

TO go forward, the noble king *H.* 5. did, before him and his council, determine a cauſe between *William Goddard*

Goddard and his wife, plaintiffs, against *Hugh Stranle*, for the tithes of the manor of Serlox and St. Lawrence, in the isle of Thanet, in the county of Kent; for the hearing whereof he sequestered the profits until the right were tried, as well for the avoiding of the breach of the peace, as waste to be committed during the controversy.

But in the reign of *H.* 6. the judgments were frequent in the court; for *Danvers* was there purged of the razure of a record by these words, *in camerâ stellatâ consilio regis*, and he which did raze it sentenced for the same. And *Ralph lord Cromwell* was attempted to be slain by one *Talboys*, and a multitude of others, sitting in council in the Star Chamber at Westminster; and in 31. *H.* 6. the same *Ralph lord Cromwell* was there acquitted for accusation of suspicion of treason made against him by one *Colson*, a priest. And myself have had in my custody a *subpœna*, bearing *teste* in *H.* 6.'s time, directed to the constable of Dover castle, to cause a portsman to appear before the king and his council at Westminster; which *subpœna* I delivered to the lord chancellor *Egerton*, who caused it to be delivered to the process-maker of this court, commanding him to make all *subpœnas* against portsmen in that form, which ever since hath been performed accordingly.

And after *H.* 6.'s successor, being *E.* 4. being assisted with his council, heard the cause of *master and poor brethren of the hospital of St. Leonard's in York* against *sir Hugh Hastings Wormerdel, and Others*, for a thrave of corn of every ploughland in Yorkshire, Cumberland, Westmoreland, and Lancashire; for the which they, being very poor, were not able to sue at the common law; or rather, for that the suits would have been infinite. And another like was heard before the king and his council for the *abbot of Bury St. Edmund's* against one *Tristram* and others of that town, for turbulent election of the aldermen, where they had no corporation nor head but the abbot: and it

appear-

PART I. appeareth by the report of *Hussey*, *Ch. Just.* 1. *H.* 7. that *E.* 4. sat in the Star Chamber in conference with his lords, and took their oaths for execution of divers laws, which, as he saith, he saw when he was attorney to king *E.* 4.

And although *R.* 3. reigned but a short time, yet it appeareth in our Year-books that he sat twice in person in the Star Chamber; the one time to hear the cause of the Spanish merchant; and the other, to be resolved by the judges of three questions which he there propounded unto them. But the English Solomon, *H.* 7. as well before the stat. 3. *H.* 7. 1. as long after, kept it as an established court of settled justice, and there in person himself deliberated of great matters; as of the intercourse of Burgundy, the marriage of prince Arthur, and the like: and many causes concerning titles of land were there determined, possession orderly established upon shewing their evidence, and security always taken for keeping the peace: and about the tenth, eleventh and twelfth years of that king these cases were more often heard before the president of the council than before the chancellor, treasurer, or privy seal; whereby it is most manifest, by the subsequent as by the precedent practice, that the court then sat not by virtue of that statute, the president of that council not being mentioned therein, but sat as they antiently had done, and by as antient, if not more antient, authority than any court in Westminster-hall.

For the ensuing times of the reign of *H.* 8. *E.* 6. queen Mary, and queen Elizabeth, there is no doubt of the existence of this court, nor of the great use the state made thereof. The first began with *Empson*'s fall, who was first blasted in this court; and the last ended with the late renowned *earl of Essex*, who received from thence the overture of his ruin.

Thus I have, as I conceive, made the antiquity of this court most plainly appear in all ages by authority as well as reasons; so that no man can doubt but that it is an ordinary court of judicature.

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§. V. OF THE DIGNITY OF THIS COURT. PART I.

ORDER requireth that I should now speak of the dignity of this court; of which to treat as I ought, I shall want the pen of a ready writer, depth of judgment, and the fluent words of a good orator. But yet this I dare say, that since the great Roman senate, so famous to all ages and nations, as that they might be called *jure mirum orbis*, there hath no court come so near them in state, honour, and judicature, as this; the judges of this court being surely in honour state and majesty, learning understanding justice piety and mercy, equal, and in many exceeding the Roman senate, by so much, by how much Christian knowledge exceedeth human learning: and surely the causes there handled were of the same nature with those that are handled in this court.

LET me give an example for one: *Statius Oppianicus*, a rich citizen of Rome, was accused by *Aulus Cluentius*, his kinsman, for many murders, and poisoning of many of his allies, by whose death he gained a mass of wealth; and so far the cause was prosecuted, as that *Cluentius* obtained a judgment against him. *Oppianicus* had no way to escape this punishment but to accuse *Aulus Cluentius* before the senate to have obtained the judgment by corruption. The state of the information against *Cluentius*, repeated by *Cicero* who made his defence, was, *corrupisse dicitur Aulus Cluentius judicium pecuniâ quâ Statium Oppianicum innocentem injustè condemnaret.*

LET me parallel this with one in our time. *Sir Anthony Ashley* was accused for a murder. His accusers prosecuted him by indictment at the common law: he fled to this court to stop the current of their malice; and he complained that divers persons, some out of malice, some out of covetousness, and some to relieve their necessities, had conspired together falsely and unjustly to ac-

cuse him of this fact, to beg his estate of his majesty to themselves; and thereupon obtained a stay of the prosecution against him, and proved his accusation against *sir James Creton* and others; whereby his innocency and their falsehood, by the wisdom of this high court, was discovered, and his life and estate protected by this high and sovereign justice.

ONLY these differences I observe: That in that popular state an appeal was allowed to *Oppianicus*, after he was convicted of these horrible crimes, which would never have been allowed in our state of monarchy; for if *sir Anthony Ashley* had stayed his complaint till his trial had been passed, and judgment had been given, upon the false accusation of these conspirators, such reverence is given to a judgment at law, that this court would not have examined whether it be obtained by corruption or conspiracy, but by reason of the imminent peril did, in this case, (which is rarely done) stay the proceedings upon the indictment till the case in this court were heard and determined: an happy justice to a gentleman, who otherwise had assuredly perished, and his estate had been utterly ruinated.

ANOTHER difference is, that the appealer in the one was the apparent delinquent, in ours the party oppressed; and their appeal was to delay justice, and ours was to protect innocency; so that in the event we far exceeded them.

THE last difference is this: That our state hath always wanted a *Cicero* or *Hortensius* to make a defence for such as are here accused. But there cannot be denied that there is no bar of pleading which yieldeth so large a scope to exercise a good orator, as that court; the usual subject being the defence of honour and honesty. But the grave *chancellor Ellesmere*, affecting matter rather than affectation of words, tied the same to laconical brevity; an honour to the court of justice, to be swayed rather by ponderous reasons than fluent and deceitful speeches.

LET

PART I.

LET me ascend a little higher, to deliver my opinion without offence, That the judgments given by great counsel (as this court is) being without doubt replete with justice, are of greater terror and amazement to offenders, than more severe punishment given by any inferior judges; which I suppose is signified in the Gospel, where it is said, that *he who calleth his brother* Raca *shall be in danger of the council.* And the same is exceedingly manifested in the judgments of this court: for whenas the severity of the law was executed upon those which in duels and single combats slew one another, and divers did justly receive the pains of death as wilful murderers for such attempts in cold blood, and upon premeditation and appointment; yet did the same little good to stay the raging of the pestilence in this Commonwealth, whereby many noble and brave spirits have been taken from their country before their due time; until this court by sharp, grave, and awful sentences, called in former times in the records of this court *fulminantes*, applied a sovereign remedy to this spreading malady, by which in short time that plague is utterly extinguished in this kingdom.

AND so likewise the grave archbishops and bishops, finding the heresy of the *Erastites* to creep into this kingdom, held it the surest way for suppression to bring it to this bar; where the bishop of Winchester's confutation, London's sharp reprehension, the archbishop's wholesome discipline, together with the grave judicial medicines, stopped the current of those flowing streams which would have been like to have brought an inundation upon Christ's church and people.

IT is not the last honour and dignity to this court, that the sentences and judgments of the same are not the opinions of one private person, but the judgments of many noble, wise, and learned men joined together; so that it is a tropic rule for assurance of truth, *quod pluribus et sapientibus videtur*; and therefore latter times have yielded some dangerous precedents, when the state of the cause complained of to the court had been by the lord chancellor referred

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PART I. to ſome one man, making himſelf judge of the whole cauſe, which no man alone ought to be judge of, no not the chancellor himſelf. It is true, that in former times cauſes were uſually referred to judges and divers of the preſence, to end and determine by conſent of parties if they could, or otherwiſe to certify to the court. But the orders have been of late times drawn up, *that as the committee ſhall certify, it is ordered that it ſhall ſo be*; ſo that no ſpecial matter is ever left to the judgment of the court: an inſufferable indignity to that great court, worthy to be redreſſed by him that ſitteth at the ſtern; for by that means the great integrity of this court, which is ſo univerſally applauded, it being impoſſible to be corrupted by reaſon the judges are ſo many, is utterly deluded; and one man, by this device, is made judge of the whole cauſe, which is moſt prejudicial. The committee for the moſt part being a judge of the inferior courts, doth willingly leſſen the growth of this high court, as being deſirous to uphold his own proper juriſdiction.

BUT let me be conceived, that in ſome caſes the king's counſel or the judges are properly and ſolely to judge; that is, when demurrer or plea is put into the court by a defendant to the form or to the matter of the bill; which being matter of law hath ever been referred to their judgment; except the plea and the demurrer be to the juriſdiction of the court, then it is moſt fit to be decided in open court. So likewiſe, if one defendant anſwer interrogatories inſufficiently, or in any caſe which tendeth not to the determination of the cauſe, the judges and the king's counſel are ſolely to judge; and it behoveth the court to give credit and countenance to their judgment; their labour is only *ex officio*, without fees or rewards.

BUT leſt the former uſual references of determining of cauſes by judges ſhould miſlead the enſuing times, let it be obſerved, that theſe uſual references were when this court held plea of matters of intereſt betwixt party and party, where the one party was too mighty, or eiſe

else poor and not able to sue; or one or both popular, and so subject to raise a faction, and sometimes a tumult or an uproar; in which cases references of determination were very necessary. But in crimes fit to be made examples, the Commonwealth hath an interest, which is the great subject of this court; in which cases the former precedents will give no warrant to make the like references.

BUT this tetter, which hath almost spread itself over the face of this great court, hath made me digress a little: I will return to another manifestation of the dignity of the court; which is, that the proceedings thereof are *tam lento pede*, without precipitation, in giving time to the defendant to defend or excuse himself, both in producing the testimony and in making defence at the bar; and that it taketh hold in judgment only of direct proofs, speaking circumstances, or more than probable presumptions; and these not single but double, which causeth the judgment thereof to be esteemed worthily, like the laws of the Medes and Persians, irrevocable. Besides, the reasons of the sentence being succinctly collected and knit together, and sagely delivered by grave, learned, and noble personages, whose very countenances add weight to their words, and tying themselves to certain and not to conjectural proofs, I have known many offenders, though judged to severe punishment, have with alacrity submitted themselves, and with cheerfulness undergone it. And not long since, in the case of one *Scarlet*, of *Shropshire*, against divers persons for embezzling of the evidences of his brother newly slain, all the parts of the cause were so sifted by the wisdom of the court, that one of the offenders being at the bar was so well contented with the justice of the sentence, that he willingly submitted himself thereunto; affirming, that though the fact were done with such secrecy as he thought could not be discovered, yet the lords in their sentence did so by circumstances track them truly, as if they had looked upon them. Where I cannot omit to extol that worthy course of binding the delinquent to appear at the hearing

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of the matter, if the matter be confeffed, or any vehement fufpicions appear againft him; at which time, although his counfel be heard, yet is he allowed to apply any thing by them omitted, or move compaffion by his fubmiffion or penitence, which feldom goeth from that bar unrewarded; and there he receiveth fatisfaction of the juft proceedings againft him, and the compunction many times of his fin; and the world and people that fee him are much moved then to hatred of his offence, and terrified by his example of punifhment, as it is pronounced, he there ftanding before their eyes; yea, the court is oftentimes moved to become fuitors to the king for mercy, he having committed unto them his juftice, referving his mercy unto himfelf; which perhaps they would not do, if a fpectacle of forrow did not ftand before them.

LET this then fuffice for the dignity of the court, that in the fame, it matcheth with the higheft that ever was in the world; in juftice, it is, and hath been ever, free from the fufpicion of injury and corruption; in the execution of juftice, it is the true fervant of the Commonwealth; and whatfoever it takes in hand to reform, it bringeth to perfection. And therefore it is well called *Schola Reipublicæ*, the difcipline whereof doth not only enter all the other courts of juftice and minifters thereof, but all the fubjects of the kingdom.

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§. VI. OF THE JUDGES OF THIS COURT.

IT followeth that I fhould, in the next place, fpeak of the prefence of this court; that is, the judges thereof, the great fenators of this ftate. And becaufe I have already glanced upon this queftion, Whether the treafurer, chancellor, or privy feal, or any of them, be the only judges of this court, and all the reft but affiftants? yet thofe judges can-

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not proceed without they call their assistants; for then it is error, as the case of 8. *H.* 7. *c.* 13. It is fit that I leave it charged, that the court, after the making of that statute, did usually determine causes when neither treasurer, chancellor, nor privy seal were present; but sometimes the president of the council alone, and sometimes assisted by others of the council, above forty times in the 12. and 13. of *H.* 7. And sometimes, when neither the treasurer, president, chancellor, nor privy seal were present, other lords of the council sat for the determining causes; which proveth that they are all judges of the court. And yet I shall hereafter shew, that the lord chancellor or lord keeper, (for their places, by act of parliament, are all one) hath divers privileges of sovereignty belonging unto him, as the supreme judge of that court, which surely doth belong in his absence to him which holdeth the supreme place in that council.

BUT first, by reason that the appearance of every party is said to be *coram rege et concilio*, it is fit that it be shewed what that council is before whom that appearance is to be made; for in the antient laws of England we read of three councils; common council, *magnum concilium, et privatum concilium.* For the first, in all our writs founded upon any ancient statute law, the writ beginneth, *Cùm per commune concilium regni nostri provisum est*, by which it plainly appeareth that *commune concilium* is the assembly of the lords spiritual and temporal and the commons of parliament; and there is *magnum concilium Angliæ.* It appears by the statute of 37. *E.* 3. *c.* 18. that false informers shall be brought before the chancellor, treasurer, and great council, to find surety to endure *pœnam talionis*, if their suggestions were false. And all the statutes made after that act of 37. *E.* 3. as well of *R.* 2. of complaints before the council of the king, as of 13. *H.* 4. *c.* 7. for certifying riot to the king and his council, which is the court of Star Chamber, afterwards by express name called

PART I. the king's council in the Star Chamber, 19. *H.* 7. *c.* 18. in the ſtat. 33. *H.* 8. *c.* 1. for falſe tokens, 4. *et* 5. *Ph. et Mar.* for ſecret contracting with young maidens, and divers ſubſequent acts of parliament. The third, which is *privatum concilium*, or the council of ſtate mentioned in the act of Eliz. it hath been queſtioned whether it were all one with the great council. Surely there is none of the privy council but is alſo of the great council; but there are ſome of the great council which are not of the privy council. Mr. Lambert remembereth an ancient record in *E.* 1.'s time, that *Henry lord Beamond*, for ſome unreverend ſpeeches to the king, was commanded out of the council-houſe: it is ſaid he was *juratus de magno et ſecreto concilio regis*; which implieth ſome kind of difference between *privatum et magnum concilium.* And I well remember I was of counſel in a cauſe where the bill prayed proceſs againſt the defendant to appear before the king and his privy council; to which a demurrer was put in. The ſame being referred to a judge, *ſir Thomas Coventry*, then of counſel with the defendant, defended the demurrer; and the ſame was overruled againſt me, as not being the proper return of the proceſs in this court. Now, that every peer of the realm which is a lord of the parliament is *de magno concilio*, it appeareth partly by the writ by which they are called to the dignity, wherein is contained that the king deſireth their conference *circa ardua negotia regni concilium ſuum impenſare*, but eſpecially for that they have uſed to ſit and give their judgments in this high court as judges in the ſame, and that moſt uſually and commonly until about the 30. Eliz.: and myſelf have heard a great lord, yet living, claim his right of ſitting there in open court; to whom the *lord chancellor Elleſmere* gave this anſwer, that he knew not whether it were his maſter's pleaſure that that queſtion ſhould be determined that day; but ſome other of the preſence maintained ſtifly the

the baron's right; which seemeth to be agreeable with justice; for it is undoubted that *Henry earl of Lincoln* and the *lord Grey*, and divers others which were not of the council of state, were present, and sat and gave judgment when *mr. Davison* was sentenced. And how they were competent judges unsworn, if not by their native right, I cannot understand; for surely the calling of them in that case was not made legitimate by any act of parliament; neither without their right were they more apt to be judges than any other inferior person in the kingdom; and yet I doubt not but that it resteth in the king's pleasure to restrain any man from that table, as well as he may any of his council from the board.

But not to digress from the matter, and to proceed with the judges of this court in order, there is no doubt but that the lord chancellor, or the lord keeper of the great seal, is the supreme judge and director of this high court; and to manifest the same, there are many sundry badges of honour and privileges of pre-eminence as belonging and incident to that high place. But lest I should be too tedious, I shall only observe their ceremonies and rites of honour every day remarkable in this place, and three denotations of his priority of place in the manner of public hearing causes in the court, and five essential parts of sovereignty or judicature of the court.

The first ceremony is, that all the great dukes, marquisses, earls, barons, and council of state of the kingdom, attend the hour and occasion of this great lord's going to sit in the high court; a great motive to him of vigilance, and that which maketh his sloth or neglect subject to the more censure. It is therefore worthy of observation of that memorable *lord Ellesmere*, that in twenty years service he never caused the lords which attended that court to stay past their wonted hour, but for the most part came into the inner chamber long before them, and bestowed his time in giving orders for matters of course to the clerks, which was a great ease and ex-

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pedition to the subject, and very beneficial to the clerks which attended him; and those few times he was absent *causâ ægritudinis* he always gave sufficient notice, lest they should attend him.

THE next ceremony is, that his ensigns of honour, his mace and seal, are carried before him in the court; and so is no other lord's of that presence; yea and his servants have the favour to attend him within the court, though many young noblemen are compelled many times to seek their places elsewhere.

THE last great ceremony of honour is, that whereas any other lord of the presence speaketh not in that court unless his head be uncovered, the lord chancellor or lord keeper speaketh always with his head covered, as a person to whom all the others bear a kind of respect or reverence.

THE notes of superiority observable in the form of hearing of causes are, first, that he calleth or directeth the counsellors which shall speak at the bar; which hitherto was with much more solemnity; for that the lord chancellor, being careful that the court should not be troubled either with silly or ignorant barristers, or such as were idle and full of words, and not careful of the truth of their informations, partly to the end that the worthiest men of that profession should be known to the presence, and partly that their causes by their industry should be made perspicuous, did upon the admitting of the suit, and the appearance of the party defendant, appoint such as should be of counsel, being men of sincerity and experience; which assuredly was a great mean for the discovery of truth in many causes; a grave lawyer holding it a part of his duty, *ut si quæretur verum non inficietur*. But latter times have rather introduced favourites or kinsmen as subjects for the judge's favour; an error surely in great men, and a scandal to so high a seat of honour, where the suspicion of any inclination to partiality should be avoided as a dishonour to the majesty thereof, and any countenance to unworthiness as a badge of infirmity.

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I REMEMBER that I have obferved that grave chancellor whom I fo often mention, but never without honour and reverence to his name and memory, when out of fome refpect he hath called to hear a man which he favoured, to ftir himfelf often upon his feat as in fome perplexity, for fear of fome error the fpeaker fhould commit in his fpeech, fuppofing that his favour fhewed publicly to an undeferving man, was a blemifh to his judgement; as, on the other fide, he gloried in nothing more than to give public grace to men either of note, merit, or to towardly and hopeful young men in their induftrious inceptions. PART I.

THE fecond public note of the lord chancellor or lord keeper's fuperiority in this court is, that upon all motions made in court which are not in point of fentence of fome caufe, he is the mouth of the court to give the rule or order. And this part requireth not only an excellent apprehenfion to conceive what is moved, but perfect experience in the courfe of that court, and an able judgement to apply the particular cafe to the ufual courfe; as alfo this is that which trieth the integrity of his uprightnefs in carrying the balance even: and if in any of thefe that great lord fhall be defective, the execution of this part of his place will fuddenly difcover him; for his apprehenfion, his only help, is, that the counfel perform their duty in a punctual and brief manner, preffing their motions to the point which they require, as they ought to do; for if they wander into vain circumlocutions or iterations, that grave judge will tie them to a point which maketh the refolution not difficult; or if it be, he ufeth the judges prefent, whofe opinion he ufually afketh in any difficult queftion in law, for his experience is quickly gained, in any of that great capacity willing to follow former times. But if any in that place be of the mind of the Lacedæmonians, to bind himfelf to walk in the dark without light, defiring rather to make than to follow precedents, he may happily

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ſhew much wit and learning, but ſhall hardly give ſatisfaction to the ſuitor, when by ſuch innovations the counſel can never tell how to adviſe the client; but until experience be gained, yea and continually for his eaſe, thoſe things which belong to the ordinary courſe are uſually referred to the clerks of the court who ſtand by him; his judgment and uprightneſs muſt ever be brought with him, and ever accompany him as *comites inſeparabiles*; for as the firſt maketh himſelf honoured and the Commonwealth bleſſed, ſo doth the other eſtabliſh his ſeat upon earth, endeareth his memory to all poſterity, and prepareth a throne for him in eternity. But if this great judge ſhall ſwerve in either of theſe, from that which is right and juſt, the reſt of the preſence may diſſent from him, and the rule of the major part muſt be the order.

The third and laſt note of his ſuperiority is, that according to his own diſcretion he commandeth the attendance of the judges in that court; for although the chief judges do moſt uſually attend this court (being an honour unto them), yet may the lord chancellor command any other judge at his pleaſure to ſit there; and that is uſual, when that the cauſe in queſtion is either in reſpect of the vicinity, circuit, trial had before him, or ſome reference made unto him, better known to ſome judge than to any other. So likewiſe he doth refer all matters in law, pleas or demurrers or otherwiſe, wherein for the moſt part he diſtributes to every judge in his circuit the cauſes which ariſe in thoſe parts, unleſs for their eaſe he referreth them to the king's counſel, which in many caſes is very neceſſary; and he doth many times require the preſence either of the judges or ſome other of the lords to accompany him, when he giveth order at times not uſual for the ſitting of the court, whoſe preſence is rather for ſplendor and magnificence, or to prevent ſuſpicion of unequal juſtice, which commonly is feared in private orders, and prevented by ſuch judicial witneſſes, than any other neceſſity, himſelf

giving the rule; which pains was often taken by the lord chancellor *Ellesmere* in the afternoons of sitting-days, to the great relief of the suitor, whose greatest burthen in this court is difficulty of hearing and dispatch: for I dare say, if the lords should sit every day, as they did in *H.* 7. and *H.* 8.'s times, and handle causes of that nature they then did, no court of this kingdom would be so replenished with causes; so confident the people are of equality and justice there.

BUT to come to the pre-eminence of this great lord in the essential parts of judicature: the first whereof is, that the direction of every cause, for the manner of the prosecution unto the hearing, and the appointing of the hearing, belongeth unto his place; so that as he hath power to dispense with the personal appearance of any man, or the continual attendance which every man is tied unto in this court, without he be admitted to attend by another, out of grace and favour, so hath he also the power to expedite or give respite to causes, according to his direction: the party grieved may fly to move in open court, where, if there be no cause, he shall have a reformation. And it is to be observed, that whatsoever the clerk of the court now doth as belonging to his office in the prosecution of causes, the same is merely the office of this great lord, and in former times wholly performed by the court; I mean the lord chancellor, president of the council, or any other great lord in their stead. But the causes of equity in chancery growing many, and other employments of special service pressing the principal officers, the clerk of the court, hath of latter times been trusted with the direction of these things of course; where if the suitor be wronged, he principally seeketh redress from the lord chancellor or lord keeper's power to appoint the time for hearing of every cause; a matter for which he hath great suit made unto him; which maketh his justice much more eminent, if the same be carried with indifferency: for if he

PART I. he appoint a cafe to be heard, and then difplace the fame again, and prefer another, he doth utterly undo the fuitor, who travelleth to attend his caufe, retains his counfel, and perhaps is never able to do it again; and it perplexeth the counfel which attend the bar, that they know not in what cafe to appear themfelves. Great care therefore ought to be taken to fet down fuch caufes as are fitting for the dignity of the court; and that after fuch cafes are preferred which the king's counfel requireth or the court ordaineth; an equal hand to be held to fet down fuch as have long time expended, and being once fet down not to difplace them without great reafon.

For the particular parts of the lord chancellor's power in the profecution of caufes, I fhall, when I come to treat of the courfe of the court, in order come unto them; only methinks that an objection might be made unto me, that I feem to contradict myfelf, when I fay that this great judge hath power in directing and ordering all caufes till they come to fentence, and yet blame the reference of caufes for the whole matter to the judges; efpecially when it is affured that many vexatious fuits are there exhibited, and many frivolous bills put in, for matter unfit for the dignity of that court, of which it is the duty of that fupreme judge to eafe the fubject and the court, I muft needs fay, that it is a great mifchief, if there fhould be no means to cut off vexatious and frivolous fuits, and offences of the higheft nature, and of the moft eminent perfons, are fmothered and concealed. But if antient courfe might prevail, all would be redreffed: for if the queftion be for want of form, the committee or lord chancellor may juftly determine it: but if the merit of the caufe be in queftion, then the fpecial matter ought to be reported, and the report read in open court, where the counfel for the other party may be heard openly; and that taketh away all poffibility of grievance, and reftoreth the court to their antient fplendor.

Thus far I have fhewed this great judge's power in all cafes until the fentence; I fhall now fhew his prerogative

rogative in the ſentence: for in all other courts at Weſtminſter, where there are four judges, if their opinions be equally divided, two one way and two another, there is no judgment entered; for which reaſon our renowned ſovereign added a fifth judge to either court, for the ſubject's caſe and expedition to bring his ſuit to a concluſion; but in this court, if the preſence be equally divided, the lord chancellor or lord keeper's voice ſwayeth it one way or the other; for if he condemn or fine the defendant or plaintiff, then hath it ever been undoubted, for that in things indifferent the beſt for the king's profit is to be taken; but where his voice in equality acquitteth, yet the pre-eminency of his judgment weigheth down the king's profit, and the perſon ſhall ſtand acquitted. For ſo ſir Stephen Proctor was acquitted by the voice of that moſt judicious chancellor *Elleſmere*; and ſo reſolved by the judges upon reference made unto them, and their opinions, after deliberate hearing and view of former precedents, publiſhed in open court. PART I.

BUT if I ſhould be aſked how this ſovereignty grew, I can give no other eſtimate but the directions which were left during the minority of *H.* 6.; in which there was an article, "That if the opinions of the lords "*Bedford* or *Glouceſter* fell to be in equal voice, that "party on which either of them is, ſhall be held the "more party," as in the thirteenth article of theſe directions is contained; which being ſettled in them, who were then the principal of the council, hath ever ſince, as it ſeemeth, reſted in the prime perſon of the court: and therefore in all the old decrees it is ſaid, that it is decreed by the right reverend the lord chancellor and the other lords. For ſo in the 13. *H.* 6. in the caſe of *Tilleſley* and *Marrow*, it is ſaid to be decreed by the right reverend *John cardinal archbiſhop of Canterbury*, chancellor of England; and others of the council. And in *Hill.* 1. *H.* 8. the warden of the Mint is ſaid to come into the court before the right reverend *William*, by God's grace, arch-

biſhop

PART I. bishop of Canterbury and lord chancellor of England; and the lords, after the sentence of the cause, which needs must bring *præmium et pœnam* in the punishment of the offender, the court hath the whole power: but in recompensing the grieved party in all causes, the power is only in the supreme judge; for damages are given but in some special cases, but costs in all, except the court express that there shall be no costs. And these costs are taxed only according to the direction of the lord chancellor without controul, so always as that the course of the court be pursued, and costs given to no person but to whom they are due; for if the lord chancellor will grant costs to any person who by course of the court ought to have none, the court will discharge those upon motion. As not long since costs were granted to *sir Thomas Wentworth* against *doctor Thornbury*, lord bishop of Worcester, in a cause where *sir Thomas* was discharged, and divers other joint defendants with him were sentenced, at the said lord bishop's prosecution; but the bishop's counsel moving the court, and shewing that where any of the defendants were sentenced so that the plaintiff ought to have his costs, and have costs paid him which were improper to one and the same cause, upon that motion the costs were discharged: but if the costs be too great or too little (so that there be just cause of taxing any), the court never encreaseth or mitigateth, much less dischargeth, but the same is in the sole power of this supreme judge; he may refer the same to consideration, either to be mitigated or discharged, as he shall think fit.

But a question hath been stirred in this point concerning this supreme judge's power: Whether he may apportion the payment of costs? or if costs be granted to be paid by divers, Whether he may appoint all or part to be paid by one, and the residue by the rest? And it seemeth it doth not lye in his power; for when costs be once taxed to be paid by one to divers, then surely, by antient course, the party to whom the costs are taxed hath election to take

take the whole costs of which person he pleaseth; which privilege ought not to be taken from him, for the party who prayeth the same hath a writ of contribution against the rest for their proportionable parts; yet it is alledged on the other side, that since the great judge hath power to discharge or mitigate costs at his own will, by like reason he hath rather power to proportion the payments.

AND surely once lord *Ellesmere*, in the case of one *Wellesden* (although at all times a most strict observer of the course of the court), did so proportion the payment of costs; but it were better not done, for any thing out of course can never be void of clamour.

AND whereas it is supposed that the power of taxation of costs came first to be attributed to the lord chancellor by the statute 17. *R*. 2. by which he had sole power to give damages upon false suggestions, and that costs are involved in the word damages, it is plain that the same is utterly mistaken; for then he should have power in this court to give the grieved party damages: but that is not in his sole power, but the act of the whole court; wherein they are not very frequent, lest men should be too much discouraged to exhibit their complaints, and so many great offences passed over in silence.

AFTER sentence, and the party's satisfaction by costs, there resteth the execution by punishment, in which this great judge hath sovereign and great power; for out of the prerogative of his place he may either hasten or delay the punishment: and where the offender is committed during the pleasure of the court, or ordered to be bound to his good behaviour during the pleasure of the court, the principal judge may determine that pleasure and will, and may discharge the party; but where one is committed by the court till he hath paid money or performed some other thing, before his performance he ought not to be discharged by the supreme judge; for the rule is general, that the public orders taken up by the court ought not to be frustrated, or be made

PART I. void by his private judgment, but may be by him explained, or any thing may be done by him to bring them to perfection and execution.

THE last great prerogative of his eminency and superiority in this court is, that the king directeth his letters, or his privy seal, declaring his pleasure in all things to be done in this court, to this great judge; of which kind many be extant upon record; as one of *H.* 7. to dispense with the appearance of one *sir Walter Griffith*, who attended the king in his progress to Exeter, and was bound by a recognizance to appear in this court, that day should be given till his majesty's return; which is directed in this sort, *viz.* "To the "right reverend father in God and our right trusty and "well beloved the Cardinal the Archbishop of Canterbury, "primate and metropolitan of All England, and our chan-"cellor of the same;" and another in 6. *H.* 8. to discharge one *Bellis*, who was sued there for supporting two of his servants in an indictment of felony, for that the matter was confessed by another upon his execution: and this was directed to the most reverend father in God our right trusty and entirely beloved the *Archbishop of Canterbury*, primate of All England; in like manner to our chancellor *Verulam*, by privy seal from his most excellent majesty, in the cause of *sir Thomas Lake.* And likewise the honour belonging unto this great judge, as his majesty's principal prolocutor, to publish and make known his majesty's pleasure to the judges and justices of peace at all times at his appointment, which is usually the last sitting of every Term; and sometimes upon extraordinary occasions and accidents any sitting day, wherein is required as much learning and eloquence as ever was of any orator in the Roman senate.

I HAVE omitted one branch of this sovereignty, in giving orders upon petitions of suitors made unto him alone, and to none other of the presence; which by reason of the great abuse thereof in latter times I intended to have omitted; but, weighing with myself the necessity to relieve

relieve the subject many times when the court is employed in weighty causes, that counsel cannot be heard, and the compassion which so great a judge oweth to the poor and distressed, I cannot dissuade the use of the same, considering that the hearkening unto them is a work of mercy, piety, and an imitation of the Supreme Judge: *offendunt nunquam thura precesque Jovem.* Yet I would not have the same be made a market for the profit of his followers, nor be received in all cases, but only in demanding things of grace and course, which may be done without hearing of the other side; for if any were required of any other nature, the lord chancellor *Ellesmere* would answer that petition, "I make no such orders upon private petitions;" with this caution and apposite rule, that if any false suggestion be contained in the petition, the order obtained upon it shall be void; or if any thing done in open court, to the contrary of that which is thereby required, be concealed, then the order upon petition is not to bind the other side; which courses being strictly held, much ease and small grievance would come by petitions, but only prejudice to those which attend the bar, which so great a judge may supply by more often hearing, than upon sitting-days, than of late times is accustomed.

AND thus much shall suffice to have been spoken of the superior judge of the court: it now remaineth to speak of all the residue of the same.

AND first, as concerning the great and eminent officers of the kingdom, the lord treasurer, privy seal, and president of the council, their places or voices in this court, when the superior sitteth, are of no more weight than any other of the table; so that the displeasure of a great officer cannot much amaze any suitor, knowing it is but one opinion; and the court is not alone replenished with noble dukes, marquises, earls, and barons, which surely ought to be frequented with great presence of them, but also with reverend archbishops and prelates, grave counsellors of state, just and learned judges, with a composition for jus-

PART I. tice, mercy, religion, policy and government, that it may be well and truly ſaid, that *Mercy and Truth are met together, Righteouſneſs and Peace have kiſſed each other.* The number in the reigns of *H.* 7. and *H.* 8. have been well near to forty; at ſome one time thirty; in the reign of queen *Elizabeth* oftentimes, but now much leſſened ſince the barons and earls, not being privy councillors, have forborne their attendance. And the court was in the reigns of *H.* 7. and *H.* 8. moſt commonly frequented by ſeven or eight biſhops and prelates every ſitting-day; in which times let me without offence obſerve, that the fines trenched not to the deſtruction of the offender's eſtate and utter ruin of him and his poſterity, as now they do, but to his correction and amendment, the Clergy's ſong being of mercy. And I well remember that the moſt reverend *archbiſhop Whitgift* did ever conſtantly maintain the liberty of the Free Charter, that men ought to be fined *ſalvo contenemento*; and in many years never gave any ſentence, but therein he did mitigate in ſomething rhetorical to adorn his ſpeech: but the ſlaviſh ſpeech of whiſpering was not heard to come from the noble ſpirit of thoſe times in that honourable preſence, and not familiarly introduced there, till a great man of the common law, and otherwiſe a worthy juſtice, forgot his place of ſeſſion, and brought in this place too much in uſe. Yet ſurely in thoſe days the benefit to the crown was equal to theſe times, if not greater; for either the greatneſs cauſed the ſame to be begged by ſome courtiers or laboured to be pardoned, or, being ſet *in terrorem*, brought to ſo low mitigation, or, for want of the delinquent's ability, by neceſſity inſtalled, as that much more would be levied to the crown, if they were impoſed with more moderation; and many more offences which are committed would come to puniſhment, if the greatneſs of the fine did not cauſe the delinquents to ſeek their peace by compoſition; ſo that the king loſeth his fine and the Commonwealth example.

§. VII. OF

§. VII. OF THE OFFICERS OF THIS COURT. PART I.

THE officers of the court yet remain to be ſpoken of, which time hath encreaſed as much as the offices themſelves; for whereas in times paſt there were no other officers but *the clerk of the court*, and *the uſher* of the ſame, there are now four *attornies*, or *ſecondary clerks* alſo, to take care of the indifferent managing of cauſes, and preparing the ſame with equality for hearing of the court; and there is alſo a *proceſs maker*, which writeth all proceſſes which iſſue out of this court, and paſſeth the broad ſeal of England.

I SHALL firſt treat of *the clerk of the court*, who is the principal officer attending this court, and is the firſt clerk of the council in place, being ſo created by the Heralds at queen *Elizabeth* paſſing through the city of London to S^t. Paul's in the year 1588, to give Almighty God thanks for the conqueſt of the Spaniſh king's navy; who was aſſuredly firſt ordained by the queen to make true entry of the rules, orders, and decrees of the court, and to keep the ſame orderly, as alſo all other records of the court; and to certify the copies to be true under his hand, and to make entry upon all appearances upon proceſſes or recognizances: I ſay, to make the entry of the appearances; for the appearance was ever made before the chancellor, or ſome of the council, and moſt commonly in the court, where, in the clerk's abſence, the uſher ſometimes took the entry of it, and cauſed the entry afterwards to be made; as in the clerk's book of appearances of record in the time of *H.* 7. doth appear. In which reſpect I have before obſerved a little boldneſs of theſe times, to appoint an inferior clerk to perform that, which the clerk of the court could not do but in preſence of ſome of the council, and therefore fit to be done by the deputy clerk at the leaſt. But of latter times the clerk of

PART I. the court doth appoint alſo the *examiners* to take alſo the examinations of all the defendants and all the witneſſes which are examined in court; and if the lord chancellor did give the favour to anſwer by commiſſion (which he hath power to do without controul), the clerk of the court did demand a fee of 6s. 8d. of every man which had that grace given to him. But that encroachment was abridged by the *lord keeper Egerton*; and I have much marvelled that the ordaining and appointing of examiners of that court is not likewiſe reſerved to the power of the principal judge, it being without doubt belonging unto him.

In the time of *H.* 7. the clerk of the court took no examinations, but the lord chancellor, or other principal judge, did appoint who ſhould take the examinations in every cauſe; as ſometimes the counſel of *prince Arthur*, ſometimes one of the preſence, ſometimes one of the maſters in the chancery, and ſometimes ſome other eminent man; and, no doubt, if the chancellor had power to appoint who ſhall take the examinations in every cauſe, the appointment of the examiner of right belongeth to him, and the words of the patent to the clerk of the court cannot carry away the right of the place. Beſides, I have in my cuſtody ſome antient collections of the officers of the court, collected long before my time; by which it appears the clerk of the court, within theſe forty years, compounded with the lord chancellor for the appointment of thoſe places, there being by right, without doubt, a part of the copies due unto him as keeper of the records. And ſurely it were to be wiſhed that theſe places again might be reſtored to their proper owners, that the ſame by a reverend and juſt judge might be beſtowed upon men of great integrity, for that it lieth in the power of the examiners to acquit the offender, and condemn the innocent; yea, and to perplex the court by uncertain teſtimonies, or tire them with frivolous diſcourſe, if that officer be either corrupt or ignorant; and being granted to the principal clerk he cannot execute it himſelf,

himself, but either appointeth or setteth the place to those who will give most; whereas an able and honest man may well deserve the benefit of the place, there being now allowed unto him but 3d. a sheet for every sheet of paper in which he taketh the examination, the rest going to the clerk of the court; and if he were appointed by the lord chancellor he could have but 6d. for the one half must belong to the clerk of the court, as keeper of the records; by colour of which place of examiner, the clerk of the court demandeth the fee of 4s. 4d. for every defendant's admission to attorney, which is the mere power and favour of the chancellor, as shall be shewed hereafter.

SURE it is that the king always appointed who should have the charge of the records; but *H.* 6. in the twenty-second year of his reign, granted the same by the name of *Clericum Consilii* to one *John Kent*, doctor of the law, who was afterwards in the time of *H.* 7. sworn of the council, and one *John Bladesfwell* appointed in his place; so that he held not both places as clerk and judge together, as hath been done in latter times. And in the sixth year of the same king, *Robert Ryder* was made clerk, as shall appear hereafter; in 1. *H.* 8. *John Valentine*; and 22. *H.* 8. upon a surrender thereof, the same was granted to *Richard* and *Thomas Eden*; and in 5. *E.* 6. granted in reversion to *Thomas March*, to whom it fell in 9. *Eliz.* and then was granted in reversion to *master Mills*, who came to it in possession about of *Eliz.* and after it was granted in reversion to the learned and eloquent judge the chancellor St. Alban; and after him to others; and by surrender to that worthy gentleman *sir Humphrey May*, chancellor of the Dutchy, and to *mr. Morley* jointly, who now execute the same by deputy. But I do conceive, that howsoever latter grants may enable the clerk to appoint examiners, of which notwithstanding I am very doubtful, yet I am sure that in former grants the king granted the office *cum omnibus vadiis, proficuis,*

PART I. *commoditatibus, membris, emolumentis, et advantagiis eidem officio spectantibus, in tam amplis modo et formâ prout, &c.* and the clerk of the court had no right to that place, but the court appointed the attorney on the contrary part to examine defendants, and many times the clerk of the court to examine witnesses; by colour whereof *mr. Eden* first engrossed to himself the benefit of that place of examination, it being assuredly a place of the greatest trust in the court, his duty being faithfully and truly to examine defendants and witnesses without any partiality, not suffering any to examine their own examinations, nor to receive examinations ready written, especially from defendants, but carefully to conceal and keep secret the examinations until they be duly published. And that he is an immediate officer of the court, it appeareth by this, that his certificate made to the court under his hand is of force and value, and may, ought, and is usually received; which could not be, if he were subordinate to the clerk of the court, and but his clerk; for no man by the law can certify to a court but he who is an immediate officer to that court for that purpose, as the professors of the common law well know. And thus much concerning the examiners of the court being now subordinate to the clerk.

I WILL now proceed with the office of the clerk, which is now executed by an able and sufficient deputy sworn for the execution thereof, and allowed by the court, and must always be, he being of great use and trust to the lord chancellor.

BUT I know not *quo jure* the clerk of the court hath of late erected divers and sundry officers; as one to make warrant for all processes, record the appearances, and receive, keep, and deliver all certificates made to the court; another to keep all records of bills and pleadings, examinations and commissions, both of the defendants and witnesses; the third is the *register*, who draweth all the orders, sentences, and decrees of the court, and all bonds of recognizance; a fourth to enter all the rules of all affi-

davits

davits and orders from the clerk of the court. For the first, I have already spoken how unfitly appearances are taken by any but by the clerk, much less warrants to be made for process by any other; being in antient time wholly awarded by the lord chancellor or the court, and a great mission to the clerk to do it. But for any man to have the custody of the records being unsworn (which is the chief cause why the clerk of the court hath his fee), I know not how by law or reason it is warranted; for either they must say that they supply the place of deputies, and so ought to be sworn, or otherwise it is a great oversight to commit the same unto them; or else they must execute those places as the deputy's clerks, and then they cannot demand any fee to themselves, but the clerk's sole and antient fee. And I fear this multiplying of officers will, in short time, be complained of as a great grievance for increase of fees; and in the mean time the records are negligently kept, and many times lost.

THE other two, which upon the matter are both registered, and therefore sworn clerks, the one for the decrees of open court, the other for ordinary course, but the first hath always been a person allowed by the court as one of great trust, who otherwise may utterly pervert the justice and honour of the court: for surely in the execution of this part of the clerk's office consisteth the sovereignty of the place; for he is trusted to collect the voices of the lords, and to enter the sentence faithfully, and none of the presence (no not the lord chancellor) can or may alter the same. And therefore, whereas I said before, that it was a note of sovereignty that the king's privy seal was ever directed to the chancellor for all things to be done in the court, so likewise it is a great prerogative to the clerk of the court, that for altering or disannulling the decrees entered in court, the king hath directed his privy seal to the clerk of his council. So you shall find that *H.* 8. did in the 17th year of his reign, direct his privy

PART I. privy ſeal to his truſty and well beloved ſervant *mr. Robert Ryder*, clerk of his council, by which he was commanded to annull a decree of that court againſt the mayor and city of Canterbury; whereby it is manifeſted that the truſt of them is wholly committed unto him; and therefore his clerk, called the regiſter, is always allowed by the lord chancellor alſo, as one which may poiſon his juſtice; and, being allowed by him and ſworn, may not upon every wilful conceit be removed; as it appeareth in the caſe of one yet living who was regiſter, and *mr. Mills* was enforced to yield good reaſon to the court for his removal.

I SHALL not need to ſet down the fees belonging to the clerk of the court, for they were fixed in the court, in a table, and ſo they ought to remain; only an antient fee of 2s. for putting or ſubſcribing his name to copies, is taken from him by reaſon of *mr. Mills*'s moderate uſe thereof, which were fit to be conſidered of. But his fee which he hath yearly from his majeſty is about 26l. 13s. 4d. Beſides, he hath his ſcarlet robes at the times of coronation, and ſuch like; and one great honour is, that he is always admitted to ſit at the lords table, at dinner, in the inner Star Chamber, for there the lords have uſually had diet at his majeſty's charge; for howſoever it were for a time omitted, yet ſurely it was happily renewed; it being a means of diſpatch of much buſineſs, which, for the ſparing of a little money, was diſappointed. And this ſhall ſuffice to ſpeak of the principal officer, called *the Clerk of the Council*, and thoſe which are now his dependents. The next are *the attornies* in order.

IT is ſure (as I have ſaid before) that at the common law every man was to attend his own ſuit in the king's court, and other inferior courts alſo, in perſon, but when he had power *ad attornat. faciend.* And firſt the ſtatute of Merton gave power to make attornies in every court; and

and the ſtatute of Weſtminſter ſecond gave power to make attornies general to thoſe which had lands in ſeveral counties; the ſtatute of Glouceſter gave power to make attornies in all caſes but appeals; but by the ſtatute of Fines it is ordained, that no judge ſhould receive an attorney but only of pleas in that court. But there is a proviſo for the power of the lord chancellor and chief juſtice, to whom (as it appeareth) there was always power to admit attornies; and they were not at the firſt ſo frequently obtained, but in a ſhort time they were as faſt reſtrained; for in 4. *H.* 4. *c.* 18. it was ordained, that the number of attornies ſhould be reſtrained, and that they ſhould be ſworn. And ſurely in the time of *H.* 7. every great man in this court made divers attornies by the licence of the lord chancellor; and every man which had appeared and anſwered and was examined, was licenſed to depart; and his attorney being by him, or any friend or perſon for him named and allowed by the lord chancellor, did attend for him, and the command delivered to the attorney did bind the party, which is called his admitting to attorney; which at the firſt was entered in this manner, *(viz.) A. B. licentiam habet comparere per attornatum cujus factum promittit ſe ratum et gratum habiturum:* and afterwards the entry was, *Licentia recedere per dominum cancellarium et compares per attorn. A. D. et dedit fidem ſe ratum habiturum:* but of latter times *ponit loco ſuo A. B. tam ad perdendum quàm ad lucrandum:* all which is done of grace for the eaſe of the ſubject, and by the lord chancellor of the court.

So that whether the clauſe of the ſtatute *de Finibus et Attorn.* or by the uſe that belongeth unto this place, to give them licence to appear by attorney, the place of the attorney is in the gift and power of the lord chancellor: and it is ſure that the *perſons* were appointed by the lord chancellor, as namely, one *Valentine*, who afterwards ſurrendered to

PART I. mr. *Eden*, about 20. *H.* 8. was allowed attorney there by the lord chancellor; but *mr. Eden* growing to be clerk of the court, claimed the gift of the attorney's place, and would have displaced *mr. Mills*, the father of him who was clerk of the council; but he was rebuked by the lord chancellor, the cardinal, for presuming to displace those who are placed by the court. Besides, the necessity of the duty to the client requireth the office not to be in the gift of the clerk; for the clerk, being inclined to make his own profit, if the attorney come in by him, will expect that the attorney shall serve his turn, and so the client shall be preyed upon, and have no direction to ease him: therefore assuredly the gift of the place, as well by usage as by right, belongeth to the lord chancellor and lord keeper.

THE duty of the attorney is to look that the cause be duly prosecuted to the hearing without advantage; and if he be pressed by any rule or order that may prejudice him in his cause, to inform counsel to move the court. He is also to write all the bills, answers, and pleadings, and examinations taken in the country by commission for his client. He is also to prefer the client's cause to hearing, and at the hearing to read all the acts, evidences, and depositions in court before the lords, which are urged by counsel for his client; and after hearing to draw up a bill of costs for his lordship's taxation, and to present them; wherein if he shall exceed, he shall deserve to be much blamed.

AND for performance of his duty he is sworn before the lord chancellor: the tenor of the oath is as followeth, *viz.* "You shall swear that you shall well and truly, according to your best discretion, execute and perform the office and place of an attorney, in his majesty's most honourable Court of Star Chamber, whereunto you are now admitted, and shall bear and behave yourself justly towards his majesty, and all his highness's loving subjects and suitors to the same court. So help you God."

WHICH

WHICH oath in that form, howſoever in latter times there was no form of an oath remaining there of record either for the chief clerk or for the attorney, but this drawn in the lord *Hatton*'s time by the advice of the following chancellor *Egerton*, then being ſolicitor to queen *Elizabeth*, who cauſed the word *office* to be put into the oath; and this form of the oath his lordſhip delivered to me himſelf to be ſafely kept.

BUT I have ſaid before, that originally there were but two attornies appointed in the court, one for the plaintiff, another for the defendant; which ſo continued long, and was aſſuredly moſt for the eaſe and dignity of the court; but afterwards there was a third attorney appointed, upon ſuggeſtion that it were fit the ſuitor might have election of ſome choice; and then there was a fourth added, which ſurely was moſt unneceſſary: and very fit it were if they might be reduced to their former number, which might be done as beneficially to the ſupreme judge as when there are four. The fees due to the attorney is 3s. 4d. and the like fee, or commonly better, for reading books at the hearing; and alſo for preſenting the bill of coſts to the lord chancellor or lord keeper. And this fee of 3s. 4d. is always due depending the ſuit, although nothing be done in the cauſe. He hath alſo 6d. in every ſheet of paper he copieth for his client, yielding the other 6d. to the clerk of the court for his care and charge for the cuſtody of the records. But the clerk ſtill deſiring to draw the attorney either wholly to depend upon him, or in ſome ſort to be appointed by him, hath endeavoured to keep the records wholly from the attorney if he diſpleaſe him, that he ſhall not have them to be copied for the client; and groundeth himſelf upon an order procured by *mr. Mills*, in the lord keeper *Puckering*'s time, to this effect: "that "the attorney ſhould deliver all the records of the court to "the clerk of the court, as appertaining to his office, to "keep;" wherein is inſerted this clauſe penned by the clerk

PART I. clerk for his own advantage, *the attornies not having to do with them but by his consent*; and likewise (which is to be understood) after they have copied them for their clients, which will plainly appear by their orders made by the lord keeper *Egerton*, by the advice of the chief judges; in which it was contained, that the attornies should always have liberty to make search for all such records or pleadings, as have appertained, or shall appertain to them to copy for their clients, without paying any fees to the clerk of the court for the same search, as many years past their predecessors have used; so that if attornies should be debarred of records belonging unto them to copy, although they be second copies (some records being ten times copied), it is as great a wrong unto them as their denial to pay the clerk of the court 6d for every sheet, and the sum is lately wholly usurped by the subordinate keeper of the records.

It is too much apparent this is a great spoil of the attorney's place, and consequently both dishonourable and prejudicial to the lord chancellor and lord keeper, they being his clerks. And I much marvel that they have not had the privilege of the lord chancellor's clerks, to sue and to be sued before him, being assuredly by reason belonging unto them. And the reason I conceive they have not enjoyed it, is partly for that they have been settled but of latter times, and partly for that the first attornies were men of great estates, as needed not any privilege; and those which after followed, of so weak and bad estates, as that they rather desired to be protected from paying any thing, than to have convenient justice before their most competent judge. Yet thus far did that wise and learned lord keeper *Egerton* privilege them, that if any man presumed to arrest their bodies during the time they attended their service before the lords, he committed the parties at whose suits they were detained, if they would not de-

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liver them. But this was upon *mesne* process, and not upon execution. And I must confess the reason of this privilege is something abated, since the making of the process of the court and the writing to the broad seal was taken away, which belonged unto them until a *process maker* was by letters patent appointed by queen *Elizabeth*, which is the next officer of whom I am to entreat.

BUT by what warrant or precedent of former times, unless of reason or justice, *habeas corpus'* have been granted from Term to Term, and from year to year, thereby defrauding men of their just debts, I can neither understand, or desire to hear it hereafter. The officer now called *the process maker*, or *clerk of the process*, is newly erected, and hath been only enjoyed by mr. *Thomas Cotton*, who now holdeth it, and by his father before him. His duty is to write all process of *subpœna* for appearances, costs or damage, of *duces tecum* of any writings or evidences, all attachments, commissions of rebellion, and commissions for examination of defendants or witnesses, writs of privilege, *habeas corpus*, *certiorari*, writs of extent, or other writs whatsoever which are returnable in this court, or issue from thence; all which he bringeth to the great seal to be sealed; and for all these he receiveth his warrant from the clerk of the court; his fees are contained within his patent. And if any question be at any time concerning the issuing of any process out of this court, the court giveth credit to his certificate made under his hand, which is an allowance of his place, and of him to be an immediate officer in the court.

THERE is another attendant on the lord chancellor, or lord keeper, which hath been heretofore one of the officers of this court, which is *the serjeant*, that carrieth the great mace before his lordship. But because his place and attendance is not bounded within the limits of this court, but followeth the lord chancellor, or lord keeper's person, wheresoever he goeth, I cannot fitly call him an officer of

PART I. this court; yet it is true that he did heretofore ordinarily, at the command of the lord keeper, give summons for appearance in this court: but of late times it is not used, unless the ordinary process of the court cannot draw the party to obedience; then by warrant from his lordship, or the court, he exceedeth the ordinary course of justice in making search in all places, and opening all houses as he shall suspect, to apprehend the person, to produce him to the court.

THERE followeth, in the last place, *the usher of the court*, whose duty is only to keep the place, where the court is kept, comely for so great a presence, and safe for the records which are there laid, and to attend the clerks of the court and the attornies at all times to search and lay up the records; and also to call all persons who are bound to attend the court, and if they make default it is recorded; also to make silence, and to attend the lords for all things they have need. He hath a convenient house for his habitation; and, besides his fee from his majesty, hath 1s. for the appearance of every man which appeareth in court; besides great profit for preparing convenient places for young noblemen, and men of quality, which flock thither in great abundance, when causes of weight are there heard and determined.

AND thus briefly I have passed through the First Part of this Treatise, wherein I should have spent much more time and paper, but intending only a summary observation of such things, as may be useful to any public place, and not injurious to the place, profit, or person of any other, I here conclude with this request—That my opinion concerning some matters of right may not breed offence, by supposing that I have done this out of a contentious spirit; but rather that my reasons might be observed, and those whom they may concern satisfied; which if I shall obtain, *ad summum votorum meorum pervenisse videtur.*

FINIS PARTIS PRIMÆ.

PART

PART THE SECOND.

Of the JURISDICTION *of the* COURT *of* STAR CHAMBER.

§. I. THE DIVISION OF THE TREATISE.

BEING in the second part of this treatise to handle the jurisdiction of this high court, I must steer a course full of peril betwixt *Scylla* and *Charybdis*; for if on the one side I shall diminish the force or shorten the stretching arm of this seat of monarchy, I should incur not only the censure of gross indiscretion and folly, but also much danger of reprehension; and if on the other side I should extend the power thereof beyond the due limits, my lords the judges, and my masters the professors of the common law will easily tax me for encroaching upon the liberty of the subject, and account me not only unworthy of the name of my profession, but of the name of an Englishman; so tender is this subject of *pupilla oculi*, which will not endure touch of examination. Therefore, to avoid all offence, I will not dispute *de jure et de facto*, and declare, as briefly as I can, what matters *are there usually* determined. In debating thereof I should leave the discourse lame if I should not say something of the privileges of this court, and how it doth vindicate any affront by afflicting deserved punishment against any, which commit any contempt against it.

So that in the second part of this discourse I shall first declare, that the causes there handled are either public or private, and they are respectively either civil or criminal; and what civil causes are here properly determinable civilly, which are of two sorts, ordinary or extraordinary: ordinarily, the suits of the king's almoner; and extraordinarily, other great matters of interest betwixt the king and the subject, which are accompanied with conveniency to the state, as well as *meum et tuum*.

PART II. THEN I shall shew what criminal causes are here to be handled. And in that, first, I shall shew that matters capital may be here examined, and not all capital; then causes which in strictness of law cannot be otherwise questioned, may be here examined; next, that causes of especial limitation by act of parliament are here proceeded in, and that those acts are but acts declarative, and no way giving power or authority to this court, which other courts may determine or have determined. And thus having enumerated many particular kinds of causes there usually determinable, a general conclusion may be collected what the jurisdiction of that court is, either in matter, time, or place. And, last of all, I shall shew the privilege of this court, and how the court punisheth neglect, indignity, or contempt offered unto it.

§. II. CONCERNING THE STATUTE OF 3. HEN. 7.

BUT before I enter into any particular causes here handled, this place requireth that I should speak something concerning the question before touched, Whether the statute of 3. *H.* 7. gave any power, strength, or confirmation to this court, as the *lord St. Alban* hath of late published? but contrary to the resolution of the three principal judges given in his presence in *Proctor's case*, as I have before mentioned; where it was resolved, that that statute enabled that court no more than it did any other court at Westminster-hall, but these lords might determine those matters in any place of England: neither did that statute make those lords sole judges of that court, and yet compelled them to call assistants, otherwise their proceedings were erroneous, as it is held in 8. *H.* 7. 13.; but the court subsisteth by antient prescription, and hath neither essence nor subsistence by that act of parliament.

AND

And it is moſt ſure, that it is a received opinion, that the court ſhould meddle with no other cauſes than are expreſſed in the ſtatute 3. *H.* 7. c. 7.; and I well remember that the lord chancellor *Egerton* would often tell, that in his time, when he was a ſtudent, *mr. ſerjeant Lovelace* put his hand to a demurrer in this court, for that the matter of the bill contained other matters than were mentioned in the ſtatute of 3. *H.* 7. and *mr. Plowden*, that great lawyer, put his hand thereto firſt, whereupon *mr. Lovelace* eaſily followed. But the cauſe being moved in court, *mr. Lovelace*, being a young man, was called to anſwer the error of his antient *mr. Plowden*, who very diſcreetly made his excuſe at the bar, that *mr. Plowden*'s hand was firſt unto it, and that he ſuppoſed he might in any thing follow St. Auguſtine. And although it were then over-ruled, yet *mr. ſerjeant Richardſon*, thirty years after, fell again upon the ſame rock, and was ſharply rebuked for the ſame; for the cauſes mentioned in that ſtatute are but ſeven in number: 1. Maintenances. 2. Giving of liveries. 3. Having retainers. 4. Imbracery. 5. Jurors receiving money. 6. Untrue demeanors of ſheriffs in falſe returns and parnels. 7. Routs and riots. A ſmall theme to exerciſe that court; where, indeed, all the principal offences here examined are not once touched; as forgery and perjury, frauds, contempts of proclamations, duels, and a multitude of others which I ſhall hereafter recite. But I will not dwell upon this point, ſeeing all that have written of this, as *mr. Lambert* and *mr. Crompton*, have made this no queſtion; and I have formerly expreſſed ſo many reaſons both of authority and caſes here heard, and ſtatutes made to reſtrain the power of this court, before that ſtatute of 3. *H.* 7. that I hope this will never be a queſtion in future times. I therefore refer myſelf to the former diſcourſe concerning this matter in the firſt part of this treatiſe, and to that which I ſhall hereafter touch concerning the ſame.

§. III.

§. III. OF PUBLIC CAUSES IN THIS COURT.

WHEN I ſpeak of public cauſes, I intend them of two ſorts: firſt, public, as being treaties and cauſes with foreign ſtates: ſecond, public, concerning the univerſal or general government at home. There is no eſtabliſhed court of juſtice within this kingdom which uſeth to intermeddle with public matters of ſtate betwixt foreign nations and this kingdom, without particular reſpect to the cauſe in queſtion, but this court only; it being compoſed (as that eloquent lord *St. Alban* well obſerves) of all conditions of men, like another parliament, ſpiritual and temporal, nobles, and lawyers common and civil, and ſo fit to diſcern, order, and diſpoſe of all things in the univerſal government; ſo that, without doubt, all queſtions of ſtate betwixt foreign nations were heretofore handled here and debated; and when there was cauſe of ſilence and ſecrecy, the entry was then made, *dum ſederunt ſecretè*. If matters were preparing and not ripe for publication, the order then was entered, that they were referred to be deliberated upon by ſome ſpecial lord of the council, for ſo it may be found in 1. *H.* 7. that to commune with ambaſſadors, *apud fratres prædicantes*; and in the ſame year the *lord Audley*, *lord Dinham*, *lord Ormond*, *ſir John Fogg*, and others, were appointed to deliberate of certain policies; and when things were fit for publication, this hath ever been held the fitteſt place to examine the deſigns and intentions of them.

So was *Empſon*'s informing the king firſt manifeſted here in 7. *H.* 8.; the viſitation of the order of Ciſtertians in 12. *H.* 8.; and ſo here was handled and debated the treaty with Burgundy; a league with the arch-duke; marriage of prince Arthur by *H.* 7.; nay, the birth of the king's children in *H.* 7. and *H.* 8.'s time were here ſolemnly publiſhed; queen Mary's marriage; and in queen

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Elizabeth's time all public occurrences: the queen of *Scots*' secret designs; the earl of *Essex*'s disaster; and many such like in the time of king *James*.

AND it is usually known that the justices of assize and justices of peace at this day repair thither to hear their charge, how they shall apply themselves in the government of the Commonwealth, when they shall carry an hard hand in the execution of some laws, and when they shall *remittere habemus*. And in the reign of *H.* 8. the justices of peace in each county were commanded to come thither to take their oaths. And so did they in cardinal *Wolsey*'s time, when, I suppose, they were few in number, and more eminent in account than in our days. So also did the sheriffs in every county in this kingdom.

AND in this court hath there always been the assay for the mint-master and goldsmiths of London, once or twice every year, at a certain time settled and prefixed, being the publickest service for the certainty of gold and silver in this kingdom.

HERE also is settled by precise and direct orders what is to be observed for printing of books by the company of stationers, whereby the inconveniences that might arise in the state are more strictly curbed and governed than the abuses of any other trade in the kingdom; for if any of that company transgress the rule and order which in the reign of queen *Mary* was then, by the decree of this court, settled and prescribed unto them, any that will complain, maketh oath thereof, and thereupon an attachment is awarded, and he apprehended thereupon, is committed until there be a reformation and satisfaction of the wrong; by which means long and tedious suits are avoided, and present redress ministered, and a well-established order honourably maintained. So likewise the weavers of Newbery and woodmongers of London; nay, in former times, when controversies have been betwixt some great lords and their copyhold tenants, the customs have been de-

PART II. creed by this court. So was it for *Condover and Prees*, in the county of Salop, being two great lordships, and near the borders of Wales, shortly after the principality was united to the crown of England.

AND I have often marvelled, that in settling of foreign trades the company of merchants have not pursued the same course, seeing that in *H.* 7. and *H.* 8.'s time the merchants of the Hans towns, the Florentines for Alloms, and many such other, were ordered by this court; and if there were any transgression, it were easily certified, without any such great trouble and perplexity as is now usual. But that happeneth by reason of the haughty ambition of the merchants, who desire to make themselves in their companies like a council of state. But the brightness of such government is so radiant, as it confoundeth their weak judgments, and maketh them all, like Phaeton, fall from their chair of sovereignty, and break the necks of their fortune and trade; which, if they took the helping and sovereign hands of state to uphold them, they would abide more firmly and constantly, and not be quashed with every accident: for so it may be seen with what stability the antient company of merchants adventurers and those of the Hans did with all prosperity continue, so long as they had their countenance and direction from this court. But they, not being able of themselves to uphold their government, have invented a new way of latter times; that is, to charge any which cross their trading by bill in this court, as contemners of the king's broad seal, and the authority thereby granted and established; which invention began by the undertakers of the *Tynne* under prince *Henry* against *Dumming* and other pewterers of London: and since that time they have strengthened that course by procuring of letters patent to be authorised by proclamation; and the breach of that command of sovereignty, being *instar regis*, hath ever had its punishment in this court, as is apparent in the punishment of builders in London, duels, &c. and before

before these, of gentlemen, which, upon proclamation made to repair into their countries at the time of Christmas, were punished in queen *Elizabeth*'s time for breach and contempt of that proclamation. But surely if the other course were followed, all trades were more surely settled and better governed, and his majesty would be free from much clamour, which ariseth from a multitude of grants and erecting of new companies tending to monopolies; which, if the former course were observed, would either never pass, or, being passed upon such public examination, would take away all clamour from the king.

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§. IV. OF CIVIL CAUSES IN THIS COURT.

I SHALL speak of private causes between party and party hereafter in their proper time and place: but because the second division of causes will more properly be handled before I descend into that confused heap of private and criminal causes, I will first handle civil causes; whereof I know men will wonder that I should offer them to be subject to this court. But there is no man, who hath at all looked into the antient records of this court, who will deny that it examined, discussed, and determined titles as well as crimes; and many times in queen *Mary*'s time, as the commons for the inhabitants of Beggars-bush, 4. & 5. *Philip & Mary*; and *Brocas* case, *Pasc.* 16. *H.* 8.

I SHALL presume to express with confidence, that they have been properly determinable there in many cases, but with their bounds and limits. But first, all controversies betwixt merchant strangers and Englishmen, or strangers on both parts, were there determined; the restitution of ships and goods unlawfully taken, or deceits of merchants. There was the case between the merchants of *Waterford* and

PART II. and sir *Thomas Twaits* in 1. *H.* 7. and many of the merchants of *Lyons* and the *Steelyard* in the times of *H.* 7. and *H.* 8. Likewise oppressed women did usually complain here for their jointures withheld from them. So was the cause of *Elizabeth Ashfield* in 1. *H.* 7. against one *Harding*, which was decreed with her. And one *Margaret Beckett* having complained in *E.* 4.'s time for the like cause, for some lands of Plumsteed and Woolwich in Kent, and no cause being found to relieve her, yet complained again in 1. *H.* 7. and was enjoined perpetual silence.

ANOTHER sort of usual complaints in points of justice was for matters testamentary; of which kind there are very many examples. And king *H.* 7. heard a cause betwixt *Haughton* a sadler of London and *Barker* a goldsmith, and decreed to the plaintiff 200 marks and 40l. according to the intention of a will of one *Haughton* deceased. And in *H.* 8.'s time it was also usual, and the court gave order to have the testator's goods put in safety to be inventoried; as in *Sessions Case* in 2. *H.* 8.

BUT I conceive the reason of that to be, for that in causes testamentary which were of value, appeals were so common and so chargeable to some, as that it was necessary to use some means to stop the current.

BUT the most common examination of titles and interests was, when any differences arose betwixt corporations, and abbots and convents, and mayor and commonalty, or bailiff and burgesses, of which sort I dare undertake to shew above one hundred in the reigns of *H.* 7. and *H.* 8. or betwixt great and mighty men, where interest drew malice, and partaking, which was dangerous to the peace.

BUT I can observe this, that in all these cases the court did never take upon them to determine the right of inheritance, only took examinations of it, referring the title to be discussed by the judges, and by them reported to the court; which was continued till 5. *Elizabeth*, and then was done in the case of *King's College* in Cambridge. And

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in the ſame year is alſo ſettled the limits of the fens of Sutton, parcel of the poſſeſſions of the biſhop of Ely; and thereupon, if the title ſtood confeſſed on either part, this court made an order by mediation, or ſettled the poſſeſſion, and directed the trial at law for the right, from the which neither party was ſuffered to ſwerve without great reaſon yielded to the court; which courſe if it were now purſued, great titles would not have five verdicts on the one ſide and ſix on the other, and the land ſpent before the ſuit ended. But, without queſtion, if when a title were ſtirred, and a complaint exhibited in this court, and both parties were compelled to bring their evidences to attend ſome reverend judge, and he to ſurvey the ſame, and to find the true ſtate of the queſtion, and report it unto this court, and then this court ſhould direct what the country ſhould enquire of, one verdict would end the greateſt controverſy, and more ſufficient jurors ſhould be returned, and leſs corruption uſed than now is. And thus ſtood the power of the court in antient times.

But of latter times, when tyranny and malice more aboundeth than ever it did heretofore, the court doth principally exercife itſelf in criminal cauſes; only I find that there yet remaineth a juriſdiction in civil matters not yet out of uſe, and that of two ſorts, *viz.* ordinary and extraordinary: ordinary examination of civil cauſes is in the caſe of the king's almoners, who ſue in this court for detaining of any goods of a *felo de ſe*, or of any deodands, although it be but of the value of twelvepence; and in this the almoner recovereth only what is detained, or the value, or ſomething in lieu thereof, as the court ſhall think fit, without fine or any puniſhment.

And in this court the titles of ſubjects who claim the goods of a *felo de ſe*, or deodands, by the king's charter, come uſually in debate, and are determined. So 6. *E.* 6. was the caſe betwixt *Allington* and *Cox*, where a leaſe of Richmond fee, with all deodands and *catalla felonum de ſe*

was

PART II. was granted for years by *H.* 8. and after *Edw.* 6. granted *omnia catalla felonum de se* to *dr. Cox* his almoner, *in augmentum eleemosinæ tam infra libertates quàm extra*; and the first lease expired, and the king made a new lease of Richmond fee to *Allington*, rendering rent; and this being referred to the *lord Mountague*, he held the second lease good, notwithstanding the grant of the almoner. And not much different is *sir James Hayles'* case in 1. & 2. *Philip & Mary*, in *Plowden.* And in these cases the court adjudged the right for the most part strictly according to the law of the land. And therefore in 9. *Eliz.* a debt due to the *felo de se* without specialty, was adjudged not to be forfeited, neither could the almoner recover any thing for it; and the reason given is, for that if it were so, the debtor should be barred of waging his law; which were dangerous, for so once a debt without specialty should always remain against a subject.

YET in the case of one *Cooke*, 4. & 5. *Philip & Mary*, for the goods of one *Lewis*, a *felo de se*, where *Cooke* and *Lewis* were bound to one *Bellingham* in 40l. which was for the debt of *Lewis*, to be paid at two several days; *Lewis*, to discharge his surety, bargained and sold twenty beeves and certain cows, upon condition to save his surety harmless; and it was agreed the principal *Lewis* should have the custody of the cattle; and upon the first day of payment he failed, and before the second he killed himself, having the cattle in his possession. But the vendees seized his cattle after his death, being to them forfeited, and the almoner sued them; in which case, although the property were clearly in the bargainees, yet, because the cattle were of greater value than in truth would save the surety harmless, it was ordered, that the almoner should procure a discharge of *Bellingham*'s bond, and that *Cooke* should deliver to the almoner either so many cattle as good, or the true value of them; which order swerving from the course of the law, which ought to take hold in forfeitures, the

the *lord Dyer*, a moſt learned and reverend man, then preſent, ſtrongly oppoſed it; in reſpect whereof it were to be wiſhed, that thoſe caſes were for the moſt part grounded legally, for the rules of law are more certain than thoſe of equity.

AND that it might ſo be, the courſe hath ever been to refer theſe caſes of intereſt to the judges, who certify what the law is; and thereupon the court maketh an order, wherein if there be extremity, they can and may moderate according to equity.

AND thus much I thought briefly to touch, to the end that I might manifeſt it, that in ſome caſes this court hath civil juriſdiction ordinarily, without exception, to this day.

Now to ſhew how it determineth titles ſometimes upon extraordinary occaſions, which is ſometimes in the king's caſe, ſometimes in the ſubject's.

IN the king's caſe, when it pleaſeth him to ſtrengthen and fortify, or diſannul, or examine the liberty of any grants or charters by him made. So was it in the ſtrengthening of the king's grant in the caſe of the *Tynne*, in 8. *Jac.* and in diſannulling a grant in the nature of a *ſcire facias*, which the king may bring in what court he pleaſeth. And therefore in this late example of the charter of the city of London, where they were not criminally queſtioned, but cauſed to ſhew cauſe wherefore their charter ſhould not be made void; neither was it the firſt in that nature, for 1. *H.* 7. a charter granted by *R.* 3. was in this court reſumed and made void. And for examining the validity of the king's grants, the duke of Buckingham's ſuit in this court for the high conſtableſhip of England is a notable example, which was in the nature of a petition of right.

IN the caſe of a ſubject it is more rare, and of late time ſeldom or never uſed as the principal, but as an acceſſary to a crime complained of; as when a deed is adjudged forged, the wronged party hath his damages. And yet of late the court forbeareth to ſettle the party, which

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PART II. is kept out by forgery, in quiet possession; the reason whereof I cannot judge, neither will I willingly examine; for sure I am, that in 10. *H.* 7. one *Lentall* pretending title to the land of one *Boucher* by a false deed, it was decreed, that he should be put to silence from any further claim concerning that deed, and he to be punished for using it; but that punishment was respited till one witness more was examined. So then the court always puts the wronged party in peace.

But if a man have his possession taken from him by force, upon punishing the force the court will restore the possession. But a miserable case is lately introduced; that, if upon a trial for a title wilful perjury be committed, and a man complain of this perjury, it shall not be examinable, because, forsooth, it will prejudicate the trial of the title; as though any man's title should protect a perjured person from punishment at the king's suit. And my lords the judges who gave this opinion, if a man should prefer an indictment before them for such a perjury, it would not stay the indictment. And shall not a bill be received in the Star Chamber for perjury, as well as an indictment in the king's bench, or at an assizes? I will not say but in a particular case it may be sometimes fit, and stand with good discretion; but to make it a positive rule in this court, is a neglect of the high power of this court, and a main blow to the jurisdiction thereof, and the greatest prop to perjury that it received in this age. For observe, I beseech you, how in short time this error hath encroached into the court, and gathered strength by a little warmth from favour like a sunshine. In *Clement Cook*'s case a great title lying in debate, and depending a writ of error for the same, he preferred a bill of perjury against the witnesses; there being many witnesses and circumstances as well for as against the testimony, the court forbore to give any judgment in it, but left the truth to be decided by a trial at law; *ergo*, &c.

In

In *doctor Steward's Case*, because the point of perjury was to maintain or overthrow the right in point of demurrer, it was held good by the judges. I am sorry to observe it, being a thing abhorring from their usual grants; sometimes to say it is no perjury examinable, unless it tend to the matter in issue, and so trench to the right; and sometimes to say, that if it trench to the matter of right, it is not examinable, because it forejudgeth the right; as good as to say, that no perjury shall be punished but by indictment.

But this dangerous case hath almost drawn me out of my way: I return to other civil causes of subjects; and amongst some others I find this a principal case, that where the offence is pardoned, the court will proceed to hearing only for the party's relief. So was it in *Read* and *Ledger's* Case in 7. *E.* 6. and there only the civil part is determined.

And it is many times usual that deeds and wills are questioned for the validity, although there be no forgery which can appear, and the deed only is damned. So was *Brakenbury's* will in *sir John Tunstall's* Case; and *Bradling's* will about 1. *Jac.* where the parties witnesses were charged as publishers. But of late time there is a new invention to charge a forgery upon some persons, and to crave a *subpœna*, in the nature of a *scire facias*, against the party interested in the land, to shew cause why the deed should not be damned; making him indeed one party to the suit, as well as to the crime; a course without a warrant, except it be in the king's case; for there needeth no such curiosity to charge the purchaser with publishing the forged deed, but that *pro formâ* he may be made a party to the charge, although he be not guilty of the crime; for if the deed be damned, the lord keeper may give sentence against him, although he be not sentenced as an offender: for so did the *lord Egerton* against *mr. Coomes* in *Tunstall's Case*. And it is usual to charge the husband and wife, where the wife only is the offender and to be sentenced, and the husband named to make him a party only,

PART II. only, thereby to make him subject to costs and damages. But I suppose in this case the party interested which is not party to the charge, cannot be compelled to pay costs for that suit which is prosecuted against others to prove them guilty of the crime, whereunto he hath not been party; but surely it standeth with good reason, that since this court hath jurisdiction of the examination of forging of wills and deeds, and of the undue contriving of them, a suit to examine the truth or falsehood of such an instrument may be as well examined civilly, as heretofore it hath been, although no person be charged with crime. And if this court would direct the trial and issue at law, both parties would find ease by it, and retainers of causes be unfurnished of much work*.

I FIND one sort of persons yet more, which solely and properly sue in this court by the lord chancellor's opinion 9. *E.* 4.; his reason there is, because they are not to be judged by our laws but *jure gentium*; and it continued one hundred years after, that the men of Guernsey and Jersey who were to be governed by their particular laws, did always sue and were sued in this court: and how it is drawn to the council table from a public court of justice I know not; sure I am, it is more proper the subject should appeal for justice to a public court of justice rather than to a private board, although the most honourable in the world.

§. V. OF CRIMINAL CAUSES IN THIS COURT.

BEING now to treat of criminal causes, I must begin with the highest; and therein I shall shew that all offences may be here examined and punished, if it be the king's pleasure,

* Some chasm or disarrangement has here happened in the manuscript.

as

as treason and murder, felony and trespass; but then are not all these offences punished as trespasses, and not capitally; for if it please the king to remit his justice, and yet not so that the world shall have notice of the offence, he may call a traitor to this bar, and take acknowledgment, and fine and ransom him.

THE examples of *Roger earl of Rutland* and other nobles in the earl of Essex's insurrection, who were so punished in this court in the time of queen *Elizabeth*, and the great earl yet living in 4. *Jac.* was proceeded against in this court with that deliberation by the king's counsel, that it was his master's pleasure to proceed against him by fine for that fact (which was treason in others), but not capitally, where he was fined 30,000l.: but by what rule that sentence was I know not, for it was *ore tenus*, and yet not upon confession. So shall we find in 16. *H.* 8. that *James Fitz Gerrard*, kneeling upon his knees, with his hands bound behind him, in his shirt, with a rope about his neck, confessed that he was consenting to the murder of one *Robert Talbot*, beseeching the king's mercy; and here it was granted. And one *Alice Hardman* prosecuted *sir John Hussey* a privy councillor in 7. *H.* 8. for being accessary to the murder of her husband; and he was commanded to forbear sitting with the lords till the cause was heard, which is the first entry of that nature that I can find. And 16. *H.* 8. the *lord Dacres* was from hence committed, upon his confession of his giving entertainment and respect to one *Henry Carlton*, a notorious felon. And so was the *lord Ogle* for the like offence. And one *Batty*, about 3. *H.* 8. was prosecuted by one *Banister* for the bearing out, abetting, and countenancing of one *John James*, and *Thomas James*, who had robbed *Banister*, as was supposed, and *Batty* was sentenced for this; but afterwards a felon at Tyburn confessed the fact, and thereupon *Batty* was freed of this sentence, which was done by privy seal.

AND

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AND *Pleudall's Case* is a notable case in 4. & 5. *Philip & Mary* for concealing murder and burglary. And there are above a hundred precedents, where persons that gave countenance to felons were here questioned. And the lord cardinal 10. *H.* 8. commanded the judges in their circuits to inquire of such, as countenanced such offenders, and to yield a particular account of them at a day in this court, upon their return out of their circuit. But I observe that the court, in all these cases which trench to felony, never examined it farther than the party's confession; for in these cases *nemo tenetur prodere seipsum*, but upon voluntary confession without oath.

BUT corruption of officers, or neglect of justices of peace in their duties, in not bringing felons and offenders to punishment, or not certifying recognizances, or not granting the peace, hath had always its due examination and proofs here. And 1. *H.* 8. in *sir Robert Plinton's Case*, because riot was mixed with murder and felony, it was long debated whether the court should proceed; but resolved to proceed for the riot. And so was it in the case of *sir Richard Maxwell* in 4. & 5. *Philip & Mary*; although now, if any death ensue upon a riot, all the rioters escape by colour of questioning. It is likewise apparent, that men that have been questioned in case of perjury, have here submitted themselves to the king's mercy, and have been here fined; and so is the statute 16. *R.* 2. *c.* 5. So was dr. *Allan*, and so *Christopher Plummer* in 9. *H* 8. fined 500 marks, which was ordained to be employed for the new building of those rooms which are now from the Court of Star Chamber to the bridge in the palace, and was to be paid to one *sir John Heyron*, who (as it seemeth) had the charge of that building. But in all these cases this is a court rather of mercy than of justice; for if these capital offences shall be proceeded against capitally, then must men be tried by course of indictment by their peers *per legem terræ*; neither can any

any suits be commenced of this nature but by the king, who hath power to remit the greater, which is felony; for a subject may not prefer a bill for any such offence, thereby to draw the examination of a crime that is capital.

§. VI. OF FORGERY.

AFTER the offences of treason, felony, and perjury, it in the next place followeth, that I should speak of the offence of forgery, being an antient subject of this court, punished by fine and ransom by the statute 1. *H.* 5. which now by the act of parliament of 5. *Eliz.* is, for the second offence, become felony; in which case, although forgery be here properly examinable, yet the second forgery, which is felony, may not be here examined to prepare a trial against the life of a man; as it was adjudged *Tr.* 1. *Jac. inter Reade and Booth* concerning the forging of the deeds of *sir Thomas Gresham*'s lands, concerning which *Markham* did only suffer death upon that statute as secondly convicted of forgery, and no other man since the statute was made. Infinite are the examples of punishments inflicted upon forgeries of all sorts before the statute of 5. *Eliz.* and then the falsifying of any deed or writing which could be given in evidence, was here examined and punished; *Bourcher*'s Case, 10. *H.* 7. in which case all the depositions of witnesses produced do remain entered in the Register's book *de verbo in verbum.* And I find in this case, by the court's direction and for their satisfaction, a witness was examined after hearing, and before they would give sentence.

IN 2. *Eliz.* one *Saxy*, was convicted for forging false testimonials under the seal of the city of Dantzic, whereby, upon trial against one *William Hudson*, his factor, he recovered 800l.; and although the forgery plainly appeared,

PART II. and the judges were required to take order for the factor's relief, the poor factor remained in execution upon the false judgment; the judges holding the judgment given so sacred, that they would not deliver the innocent without the consent of the forger, who maliciously remained in prison himself, rather than he would deliver his wronged factor.

But after the statute of 5. *Eliz.* questions began to arise, what was forgery and what was not; which before the statute was never doubted: and yet the act is but an affirmative act and declarative; as was the statute of 1. *H.* 5. only made for false writings concerning lands, and no other law made before 5. *Eliz.*; and yet we see *Saxy*'s Case adjudged; and 2. *Eliz.* *Apriz*, *Chinock*, and others sentenced for forging acquittances; and in 3. *Eliz.* one *King* also for forging an obligation: by which, and many more, it appeareth, that the law punished these offences before the statute 5. *Eliz.* and these were but affirmations of the common law. And in January 5. *Eliz.* before the statute, one *Thimbleby* was sentenced, for forging a lease, to lose his ears. So that if the offence of forgery be said to have been done against the laws and statutes of this kingdom, the offence may be punished at this day, as it was before the statute; or if it be within the statute, this court hath power to inflict the punishment of the law. But if the bill be laid upon the statute, then must the offence be proved to be within the statute, or else no sentence can be given. I shall therefore set down some Cases which have been questioned upon this statute, after the making of this statute 5. *Eliz.*

In 9. *Eliz.* *Dyer* 264. a question was moved, Whether the putting out of a *die confectionis* in a lease for years destroyed the lease and was forgery? and then it was adjudged that it was not; and the reason was, for that the words were idle. But in *Ball* and *Seabrook*'s Case, 17. *Jac.* a lease made for lives *habendum from the day of the date*, and that being void because a freehold must

must vest *in instanti* by the livery, or not at all, the lessee having paid a great value for the lease, to make his lease good altered it, and made it to hold from the *day of the date hereof*; and this was held forgery within the statute. And I well remember that in the latter end of queen *Elizabeth*'s reign a question was once stirred betwixt *Howarth* v. *Beedham* and *Love*, where a deed was made by the plaintiff's brother in XXXVI. *Eliz.* to *Beedham* and *Love*; they, to over-reach a former deed made to the plaintiff, put out the letter (I) and made it XXXV.; and held forgery within the statute, contrary to the opinion of *Crompton*, who held it no forgery if the deed were once good.

IN 12. *Eliz. Dyer* 238. *Manning*'s Case, it was a question, Whether the adding of any thing to the will of a dying man, without his privity, were forgery within the statute? and then held not to be within the statute. But afterwards, about the 42. *Eliz.* in the case of one *Rochester*, where a man devised lands to his son *Richard* without saying more, *Richard Rochester* put in the words, *and to his heirs*; and it was held to be forgery within the statute; but upon the doubtfulness of the proof referred to a trial at law. But I conceive that the meaning of the book is, that it is no forgery of the whole will; for, *utile per inutile non vitiatur*. And so it was held in *sir Edward Morrice*'s will, where *Rich*, his solicitor, inserted divers annuities without warrant; and yet they destroyed not the will for the residue, but it was allowed good *per sententiam Curiæ*.

IN 13. *Eliz. Dyer* 302. it grew a question, Whether the forging of a testament, whereby only chattels or leases for years were pretended to be devised, were forgery within the statute? for that it was clearly out of the first clause, but it is within the second clause for forging or writing any thing personal, and so often adjudged. But if a lease only of a copyhold be hereby devised, it is out of the law by the words (not being copyhold); and the other general words will not help it, because it is particularly named by way of exception.

 IN

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In 15. *Eliz.* the famous case betwixt the lord *Cromwell* and *Taverner* for forging a custumary of the manor of North Eltham, with two seals to it, which made great show of antiquity, it was doubted whether it was within this statute; and adjudged within the statute, for that it was a writing sealed, whereby the inheritance of the lord might be molested, but it was no court roll, neither did any interest pass thereby. But this court doth in these cases regard the intention rather than the fact; for in the Case of *Heynes*, at the suit of *Quarrel*, for forging some words in a copy for a customary tenement, the copy in the limitation of the estate, was insensible; and yet was *Heynes* sentenced to the pillory, for *oculus suus fuit nequam.* And in this case of *Taverner* was the writ devised by the judges to levy costs and damages according to the statute in English, which the judges would never have done if they had known there had been 100 writs of *levari facias* sued forth in former times to levy costs and damages. And in this case also was the great question, Whether the king could pardon the corporal punishment? which the queen then did, and hath been since often done. But for the costs and damages, none but the parties grieved can discharge it; but before the sentence given, the king may pardon the whole offence. And so he did in *sir Pexall Brocas*'s Case, 4. *Jac.* and in *Hall*'s Case, 5. *Coke*'s Reports, fol. 51.; for all suits in this court are the suits of the king, which he may pardon at his pleasure; as it was in *Drywood*'s Case. But being heard, and the grief appearing, the party's interest then ariseth, because *transit in rem judicatam*, and justice then must do satisfaction. So likewise have I ever conceived, that upon any such pardon pleaded the court ought to give the party grieved his costs; for the defendant's pleading of a pardon is a legal confession of the fact, whereby it appeareth, that the plaintiff had *justam causam litigandi*, and so ought to have his costs; of which matters more at large in their proper place.

BUT

'BUT of late times a great queſtion hath grown in the Caſe betwixt *Sallaway* and *Walle*, upon what lands the coſts and damages ſhould be levied; and being referred to *Bacon*, attorney general, and *Yelverton*, ſolicitor, they certified that it was to be levied only out of ſuch lands as the defendant was ſeiſed of at the time of the ſentence given, and that the ſheriff might receive the rents of the lands formerly leaſed, and the iſſues and profits of lands not leaſed, but ſuch only as ariſe of the nature of the ſoil; for the ſheriff could not till and ſow the land to the end to levy the ſame. And of latter times many queſtions have been ſtirred concerning the forging of wills; the lord *Egerton* being of opinion that the ſtatute of wills was not only the ruin of antient families, but the nurſe of forgeries, for that, by colour of making wills, men's lands were conveyed in the extremity of their ſickneſs, when they had no power of diſpoſing of them. And he would merrily tell a tale: That a friar coming to viſit a great man in his ſickneſs, and finding him paſt memory, took opportunity (according to the cuſtom of thoſe times) to make proviſion for the monaſtery whereof he was; and finding that the ſick man could only ſpeak ſome one ſyllable, which was for the moſt part "Yea" or "Nay," as an imperfect voice, forthwith took upon him to make his will; and demanding of him, Will you give ſuch a piece of land to our Houſe to pray for your ſoul? the dying man ſounded "Yea." Then he aſked him, Will you give ſuch land to the maintenance of lights to Our Lady? The ſound was again "Yea." Whereupon he boldly aſked him many ſuch queſtions. The ſon and heir ſtanding by, and hearing his land going away ſo faſt by his father's word "Yea," thought fit to aſk one queſtion as well as the friar; which was, *Shall I take a cudgel and beat this friar out of the chamber?* The ſick man's anſwer was again "Yea;" which the ſon quickly performed, and ſaved unto himſelf his father's lands.

AND

PART II. AND the lord *Egerton* abſolutely controlled the opinion in *Sackville* and *Brown's* Caſe, 6. *E.* 6. in *Dyer*, that ſhort notes taken from a dying man and put into the form of a will after his death, was a good deviſe within the ſtatute 32. *H.* 8.; and although he did not always convict perſons of forgery who made wills in extremities, yet he did uſually condemn the wills, as made *in extremis*, when men had no good diſpoſing memories. And ſo he did by the will of *mr. Brackenbury* beforementioned, *ſir Randal Brewerton's* will, and many others; which part of the ſentence ſounded civilly rather than criminally, being a will ill made, and yet could not be ſaid to be forged. But *Drew* of *Boſtock* was ſentenced upon the ſtatute for forging a will, whereof he took inſtructions by word only, and not in writing, and put the ſame in form of a will, and publiſhed it after the death of the teſtator as his laſt will.

IT is evident how much that wiſe and worthy lord laboured to make the world underſtand the miſchief which that act of parliament of wills brought with it, in miniſtering opportunity to wicked men to falſify the laſt wills and teſtaments of wealthy men; at which time, like ravens, they fly about the dying carcaſe to devour his eſtate ſo ſoon as he is dead, when many times they durſt not come near him ſo long as he hath good underſtanding. The infinite examples which happened in a ſhort time manifeſt the truth hereof; and his known wiſdom manifeſted to the laſt parliament may ſtir up another to conſider of his reaſons with the precedents of time; in which let me note, by the way, that in my time of obſervation in twenty years, I know but one deed queſtioned to be unduly made in time of extremity, which was controverted betwixt *Southmead* and ———; and yet it was not overthrown, although it was very ſuſpicious.

MANY are the forgers which have been ſentenced in this court which were not within this law; as and *Day*, 4. & 5. *Philip & Mary*, for forging of falſe teſtimonials; and the putting of the ſeal of the town of Bridge-

water

water to a certificate of good behaviour, without the confent of the mayor and the greateft part of the aldermen, by *Harvey*, which was one of the aldermen; he was fentenced at the fuit of one *Popham*, about 12. *Jac.* And fo the furreptitious putting of the feal of the governor of *St. Bieghers* by one of the governors without the confent of the reft, lately adjudged in *Bifcoe*'s Cafe; which, under favour, I conceived was a forgery within the ftatute; but yet it was not fo fentenced. By all which we fee the ufe of this court in cafes of doubt: That it is fure, without fcruple, either upon the ftatute, or, by its former ability, by common right, to yield relief to him that complaineth, and inflict due punifhment upon the offender. So hath razure alfo been punifhed in writs; as one *Sparkling*, an attorney, 1. *Eliz.*; one *Tifdale*, about 10. *Jac.* at the fuit of *Barrow*; and of late times *Darling*, at the fuit of *Hofkins*. And likewife have there been many fentenced for inferting names in blank warrants of fheriffs, of which fort alfo are *coram nomina*.

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§. VII. OF PERJURY.

HAVING now fpoken of forgery as it is not capital, but being the firft offence (the fecond being felony), I cannot fever her from her fifter *perjury*, which I will handle in the next place; for I fhall neceffarily handle feven great offences (ufually punifhed in this great court) diftinctly by themfelves, and the refidue in my prefcribed order; and thefe are, *forgery* (already fpoken of), *perjury* (as the companion of forgery), *riot* (the excefs whereof may trench to be felony), *maintenance*, *fraud*, *libelling*, and *confpiracy*.

PART II. AND first of perjury; wherein I must first meet with that positive opinion 8. *Eliz. Dyer*, that there was no punishment for perjury before the statute of 5. *Eliz.* but against jurors only by way of attaint: and I cannot but marvel that so learned and reverend men should light upon so fond an opinion, whereas I dare undertake to shew them, that the common law of England had a punishment for perjury before the Conqueror; and when a certain company of learned men, to the number of twelve, in every shire were appointed to set down their laws; which they performed accordingly, and declared the punishment for perjury, as *Roger Hovedon* remembereth. And in the reigns of *H.* 7. *H.* 8. queen *Mary*, and the beginning of queen *Elizabeth*'s reign, there was scarce one Term pretermitted but some grand inquest, or jury, was fined for acquitting felons or murderers; in which case lay no attaint. In 4. *H.* 8. a jury of Abingdon sentenced; and in 18. *H.* 8. a jury of Kent was there sentenced for not indicting one *Horn*, and the party ordered to be new indicted; *Throckmorton*'s jury, in 4. & 5. *Philip & Mary*; a jury of Westmoreland for acquitting one *Hulham* of felony; and *Hall* and others of a jury in Cornwall, for acquitting one *Tooker*, who was sentenced upon the relation of serjeant *Brown*, one of the justices of assise; and the same day a jury of Westmoreland, And in 13. *Eliz.* a jury of Stafford, being a coroner's inquest, about the death of one *Palmer*. And the same year one *Robinson* and his fellows, of Derbyshire, for finding *ignoramus* upon an indictment for the death of one *Woodroff*. And in 22. *Eliz.* a jury was sentenced for acquitting one *Hoody* of felony, and bound over by justice *Manwood*. In 8. *H.* 8. one *Leake* was sentenced to wear papers for perjury committed in an affidavit. In 7. *H.* 8. the mayor of Newcastle was committed to the Tower for perjury in his examination. In 8. *H.* 8. one *Compter* being examined for breach of the privilege of the court in procuring one to be arrested

during

during his attendance, and denying it upon proof made thereof, he was ſentenced to wear papers. In 3. *Eliz.* one *Buckett* being examined in open court upon a queſtion aſked him, and his oath being afterwards diſproved, was ſentenced to the pillory.

All which (it muſt be agreed) were injuriouſly puniſhed, contrary to the law of the land, if their opinion were true, that there was then no law to puniſh perjury; beſides the horrible imputation which ſhould be upon the government, that ſo deteſtable a crime as perjury ſhould be privileged in this kingdom with impunity; the ſacred bond of an oath being the only trial whereby men's lives and inheritances are determined. And yet the opinion goeth further, That by that law, if they could not of right puniſh it before, they could not puniſh it after; for the proviſo of the ſtatute is, that this court may puniſh perjury in ſuch wiſe as they ought to do *and uſed to do*, which is in the copulative; ſo that if they ought not to do it, the uſage giveth no ſtrength, and then the puniſhment of ſuch perjury as is not within the ſtatute, is unlawful at this day: which caſe, becauſe the common lawyers rely ſo much upon it, giveth juſt occaſion ſtrictly to obſerve what perjuries are within the ſtatute 5. *Eliz.* c. 9. and what not.

And for that, it is to be obſerved, that no perſon can be puniſhed by that law except he be produced as a witneſs to teſtify in ſome caſe, or do, either by ſubornation or his own wilfulneſs, depoſe falſely; ſo that it is clear, and hath been often reſolved, that a defendant, or a party, or any produced to make an affidavit, is no party within this law; and yet witneſſes in court chriſtian are excepted. So likewiſe, if a witneſs depoſe any thing in a circumſtance which tendeth not to the matter in iſſue or queſtion, it is not perjury within the law: as if there be a queſtion of an incloſure, and a witneſs will depoſe a beating concerning the putting in of cattle, when indeed there was no blow, it was not within the law, as it was held in *Dynch* and *Doyley*'s caſe, becauſe it was not the matter

PART II. in issue; yet the lord *Egerton* held it punishable in the Star Chamber, and so it was punished. And although perjuries in court baron and court leet are punishable by this law, yet if the homagers make false presentments, or any jurors find indictments falsely, it is not within this law; for they are not witnesses in that case no more than any jurors whatsoever.

HAVING considered what perjuries are within the statute, let us see what perjury is punishable in this court not being within the statute. And I find, before the making of this law, that is in 4. *Eliz.* there was a positive order made, that no man should be punished for perjury in giving evidence to a jury, if the verdict passed with the evidence, unless the justices of assise before whom this trial was had, were made privy to it; because it seemeth, bills of perjury grew very frequent against witnesses, in all cases when a verdict was passed, to work a revenge or draw a composition, which the court thought fit to restrain. And it did well till the statute 5. *Eliz.* was made: but after there was found a greater mischief; for the judges being desirous to extend their own jurisdictions, and having power in that case by the law, drew all those complaints to indictments before themselves; so that this court quickly resumed their power, and hath fully retained the same unto this day.

BUT it hath been questioned, Whether perjury committed in the ecclesiastical court be punishable in the Star Chamber? which I suppose arose out of the exception in the statute 5. *Eliz.*; but the same hath been often cleared, and remaineth without scruple. And because in these courts, in all depositions taken on the affirmative part, the party deposeth *ut credit*, which is taken to be a sufficient testimony, it hath been adjudged, that a perjury may well be assigned upon *belief*, upon a deposition taken there, which cannot be in another court; and so it was adjudged in the Case of *John Barnardiston* against the lady *Barnardiston*, about 3. *Jac.*

MUCH

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MUCH debate hath likewise been, Whether perjury committed in the stannary court shall be punished here? by reason that, by the antient charters, the lord warden hath power to punish it; but upon long debate all the judges of England resolved it in *Hill.* [illegible] *Jac.* Yet about 13. *Jac.* in the Case betwixt *Finch* and *Mansfield*, *mr. serjeant Hendon* pleaded the same plea to the jurisdiction of the court, for that the defendant was an inhabitant of the cinque ports, where the lord warden hath power to determine perjuries committed within the liberties; but the lord *Egerton*, being moved in open court, took the plea into his own consideration, and not only over-ruled it, but sharply reprehended *mr. Hendon*, being then a suitor for the coif.

IT cometh late to be a question, Whether perjury committed in the chancery be examinable and punishable in the Star Chamber? But in 34. *Eliz.* in the Case between *Stephens* and *Spencer*, it was not doubted, both in the depositions taken before the examiner of the court, and before commissioners by virtue of a commission taken out of that court, which course is settled by five hundred precedents within one hundred years: yea, in 45. *Eliz.* one *Shepherd* was there questioned for making a false affidavit in chancery, for swearing that he was in possession of a tenement at the time of a bill exhibited in chancery, and thereupon obtained an injunction for his possession; for which he was questioned in the Star Chamber; and it fell out that both he and his adversary were in possession, and he was thereupon dismissed; for the law adjudgeth a possession in him which hath the right, which he presumed was in himself, and so no perjury.

BUT the question hath heretofore been, Whether a bill might be preferred in chancery for a perjury there committed? And in 12. *Eliz.* adjudged that it could not be but by Latin pleading in form of an action upon the statute, which must be transmitted for trial into the king's bench

PART II. bench or common pleas; for the defendant ought not to anſwer upon his oath, nor be examined upon interrogatories, in that court; and ſo, if perjury ſhould be there examined, the king's ſuit ſhould receive great prejudice and diſadvantage. But I leave that to conſideration, for that it is ſaid that the chancery hath one precedent, like one ſwallow, to make their ſummer. But I believe, if it be well conſidered, it will be found to be no perjury, but a miſdemeanor; and even that, in the Caſe of *Large* and *Agneſcombe*, was held examinable in the Star Chamber. In 31. *Eliz.* betwixt *Jeniſon* and *Brand*, perjury being committed in an Anſwer in the Dutchy Chamber, and in the depoſition of witneſſes, they were both ſentenced in the Star Chamber. And yet I ſuppoſe the Dutchy hath power to examine a miſdemeanor committed within their own juriſdiction; for I find that in 4. *Eliz.* a riot was complained of to this court by the attorney general, in which a man was ſlain, and that by conſent of the chancellor of the Dutchy, whoſe conſent would not have been required, if he had not had juriſdiction. In *Tr.* 34. *Eliz.* in the Caſe betwixt *Dodſon* and *Everenden*, perjury in an affidavit in the court of wards was here ſentenced. In 12. *Jac. Rowland Ap Ellys* before-mentioned was here ſentenced for perjury in proving an information in the exchequer for deſtroying the king's woods. So that perjury in all courts doth here receive its puniſhment; yea, perjury of homagers in a court baron was here puniſhed 34. *Eliz.* in a Caſe betwixt *Baſtard* and *Harvey*. But this court cannot examine the perjury of jurors in giving a falſe verdict between party and party by the practice of latter times, for that only is to be remedied by attaint: but the imbracery, corruption, and inſtruction of jurors is here examinable. And the firſt Caſe that I find over-ruled in that point is *Hil.* 2. *Eliz.* in one *Snelgar*'s Caſe and his fellow-jurors of Hampſhire; before which time it was uſual. Yet for a falſe verdict given in a court baron, a bill will lie in this court; and the reaſon

reason is, *ne delicta maneant impunita*, for no attaint lieth at the common law, as is before alledged, in inquests of office.

A LONG-debated question hath been, Whether perjury committed by any witnesses upon indictments for the king, shall be examined and punished in the Star Chamber? And the reason yielded hath been, for that it will deter the king's witnesses to yield their testimonies in all cases. In 16. *Eliz.* in the Case of *sir Thomas Cockain*, who preferred a bill against witnesses for perjury, in giving evidence upon an indictment for the queen, which was thereupon found, the cause was dismissed upon the report of the then attorney general *sir Gilbert Gerrard.* And in *M.* 24. & 25. *Eliz.* in the Case of *Edmond Trafford versus Booth* and Others, the defendants being charged with perjury in giving evidence upon an indictment of forcible entry before justices of peace, the cause was also dismissed. And in the same Case the judges certified, that perjury in a witness upon finding a *diem clausit extremum* for the king, cannot be questioned in this court by the king, it being his own title; and this by the opinion of the two chief justices, *Wray* and *Dyer.* And so in *Hil.* 16. *Eliz.* by the report of *mr. serjeant Jefferies*, perjury in a witness before Commissioners of Survey not here punishable.

BUT latter times and manifest corruptions of witnesses in the king's case, hath bred a settled course of punishing perjury even in witnesses for the king. In *M.* 3. *Jac.* it was twice debated; once in point of an indictment in the Case betwixt *Miles* and *Daventry*, and the second time in the Case of a testimony given in the exchequer for the king betwixt *Jenner* and *Warren*, where *Warren* testified falsely to prove an information of usury, and was sentenced to the pillory; since which time the question hath rested in peace. And in the Case of *Daniel Wright* upon an indictment of battery, although the plaintiff stood convicted upon

PART II. upon his traverse, the court sentenced the defendant for perjury, and that without scruple; where I may observe a difference between the judgment of the court given upon the sentence, and those that are led by the certificate of judges and private men, in which one sentence is of more weight than twenty reports.

ANOTHER good question hath been often moved, Whether after sentence given upon the testimony of witnesses, those witnesses shall be afterwards questioned for perjury? for that if their depositions be false, it overthroweth the sentence. But it was clearly adjudged in *G[illegible]nou's* Case; for that otherwise wicked and perjured persons might ruinate any man by a false deposition in this court, and the party never able to prevent it (for he cannot know it till after the publication, at which time it is too late), nor the law should have ability to punish it; which were such a mischief as were fearful for the subject in this wicked age to live under their government. Neither was that a good distinction which was taken in *Smyth* and *Lacye*'s Case by a great judge, that the subornation should be examined and not the truth of the testimony, because it trenched to the overthrow of the sentence, or to prove it unjust, for the sentence is not dishonoured thereby; but the court judging according to the testimony, judgeth justly and honourably; and if the testimony be false, shall not the witness be punished? I make no doubt but that the three witnesses in the *Dutch Case*, if there were falshood in their testimony, might be justly punished, and yet the sentence of the lords, grounded upon their former testimony, be held just and honourable, in all ages, and amongst all nations.

BUT without doubt subornation cannot be questioned without perjury; for there cannot be a manner of doing without a subject, and perjury is the principal to which subornation is accessary; insomuch as in 1. *Jac.* in the Case betwixt *Read* and *Waterman*, where the person charged with perjury died hanging the suit, and the suborner

ſuborner got a diſmiſſion, with coſts, for not proſecuting; the coſts were diſcharged, becauſe the plaintiff could not proceed for the ſubornation without perjury. Since which time that precedent hath been often followed; and when an offender hath been charged with a riot, and upon his examination he hath denied it, and it is proved againſt him, and he is ſentenced for it, and afterwards a bill preferred againſt him for perjury in denying it, in the opinion of the lord *Popham* this perjury is not examinable, for that it is neceſſary there ſhould be an end of puniſhment; and if he ſhould be puniſhed for perjury for the denial of the riot, he might again be queſtioned for denying the perjury; and ſo there would be no end, but it would be infinite.

It is true that, in former times, the court did puniſh the perjury of the denial in the firſt cauſe, to make an end of ſuits, and moſt uſually in the Cardinal's time; and the ſame courſe continued long after; as we may ſee in *Crouche*'s Caſe in 2. *Eliz.* which might well be done by way of aggravation of the offence, but was unjuſt to be done as the principal offence, becauſe it was not complained of in the bill; and the court ought to puniſh nothing but what is *allegatum et probatum* by teſtimony, unleſs the party will voluntarily confeſs it, as *Bruncker* did; and then the court proceeded upon his confeſſion, although he confeſſed another matter than that he was charged with: he, being charged with perjury in making a falſe return as the ſheriff, confeſſed that *he never took the oath of his office*; and was for that ſentenced.

I have heard it often moved, Whether a man ſwearing falſely upon a wager of law, it were puniſhable in the Star Chamber? And although I have not judged in the point, yet I dare ſay it is there puniſhable; for in 30. *Eliz.* a man put in a foreign plea to an action in London to bar the proſecution of a ſuit (which for favouring the juriſdiction of the court is always done upon oath), and this plea was feigned, this was puniſhed; and then much more a falſe oath

PART II. oath in a wager of law, whereby a juſt debt is made irrecoverable. It may be thought ſtrange that a man depoſing truth ſhould be puniſhed for perjury, and yet it is moſt certain; for in the Caſe of *Vernon verſus North*, a man was charged to have by perſuaſion depoſed the value of cattle which he never ſaw; and that was held to be perjury, although he depoſed truth. And in the Caſe of *Henry Earl of Lincoln* againſt *Jane Burr*, *Trin.* 1. *Jac.* in depoſing a force upon an indictment, when in truth ſhe was not then preſent, ſhe was ſentenced for perjury, although it was truth which ſhe ſwore; and this alſo was in her evidence upon an indictment for the king.

I SHOULD run into a large field if I ſhould ſet down indifferently what perjury this court hath examined, and may examine: I ſhall ſhortly attain my purpoſe to expreſs what perjury may not be examined in this court.

AND, firſt, it is an undoubted caſe, that a complaint of perjury committed in a caſe not determined, ought not to be examined in this court; for if the truth or falſehood of a material depoſition ſhould be examined before the cauſe is diſcuſſed, in which it is made, it muſt neceſſarily prejudicate the court which was firſt poſſeſſed; and the reaſon of the caſe is adjudged in 2. *Eliz. Dyer:* whereas upon a ſuit brought for forging of falſe deeds againſt a baron of the parliament, the lord (hanging the ſuit) brought an action *de ſcandalis magnatum*; and adjudged that it lay not, hanging the firſt ſuit undiſcuſſed. Neither, by the reaſon of that book, doth it lie after the ſuit determined; for it is no ſlander to ſue in a proper court for any thing, although the ſuggeſtion be falſe. Yet one thing is to be obſerved wherein ſome of the judges have varied from the opinion of the court, for they in that caſe will adjudge the ſuit as no cauſe of complaint, and ſo upon demurrer to be abſolutely diſmiſſed; but the court hath conſtantly maintained it to be the only cauſe of ſuſpenſion of the examination of perjury, until the

firſt

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suit be determined, if it be set forth by way of plea upon oath, being matter of record in another court.

ANOTHER perjury not punishable, nor examinable, is perjury committed against the life of a man for felony or murder whereof the party accused is convicted by verdict and judgment; and this perjury hath not been allowed to be examinable: and one reason is, lest it should deter men from giving evidence for the king; and another, lest it should bring a scandal upon the public justice of the kingdom, if the cause of a person so convicted should receive new examination; the nature of man being to compassionate the worst men in such extremities, and to pick small occasions to try a witness in any circumstance that might tend to make a guilty man seem innocent: yet assuredly, as well as the truth of a testimony given in a cause in this high court may, after sentence, receive examination in point of perjury; so, in strictness of reason, in my judgment, the other may receive examination; and it is forborne but only in discretion, that when a man is executed, the truth of his accuser's testimony may not be examined, because the execution cannot be reversed. No more is there any reversal of a sentence in this court; and therefore if some notorious complaint of villany should be discovered, wherein by false accusation an innocent man is attainted, surely at the suit of the king this may be examined and punished; yea, although the party were executed; as well as one *Ligeate*, in *M.* 5. *Eliz.* was questioned for executing one man for another in *Wyatt's* rebellion, and was there punished.

IT is clear, and without question, that perjury cannot be assigned in a deposition where the deponent sweareth to his remembrance, for it cannot be known but yet that it is doubtful, for by his words and actions his knowledge may appear; nor in the affirmation of another man's speech, where the averment is, that he did not speak it; for if

PART II. twenty persons be present in a room, one person may hear the words and the rest not; but if the averment be, that the witness was not in that company at the time when the words were spoken, perjury may not be assigned if the party swear the words to be spoken at a time and place certain.

§. VIII. OF FORCE.

IN the next place I am to speak of force, which must be most principally defended in all well-governed commonwealths; it being the prime care in all governments to maintain the peace of the country: and this will branch itself into seven parts, *riots*, *routs*, *unlawful assemblies*, *forcible entry*, *duels*, *waylaying*, and *single assaults upon privileged persons*.

IT is called a *riot*, when three or above assemble themselves together to do an unlawful thing and do it; a *rout*, when they only assemble themselves together to do an unlawful thing and do it not; an *unlawful assembly*, when two or more assemble themselves together to do some unlawful thing; a *forcible entry* may be committed by one person alone, if he enter with force or keep the same with weapons, when neither he nor any from whom he claimeth hath been in quiet possession of the same for three years; so that a riot cannot be done but in the presence of three: but if two be actors and present, and the third an abettor and within view, it hath been adjudged a riot; and if two be actors and the third a commander, although he was absent, yet he was a rioter; as it was held in *sir George Manners*'s Case: and *Hudlestone*, at the suit of *Fleetwood*, in *P.* 14. *Jac.* writing a letter to two of his men from London, to cut in pieces certain turves which were digged in a pit in question, he was sentenced as the third rioter; and the reason which the lord *Coke* gave was, for that in force and treason there could be no accessaries, if there

were

were no commands; and therefore commanders are either principals, or no offenders.

If two men come to do an unlawful act, and after them come two more by agreement, not to be there four at once, but *diversis vicibus*, this hath been adjudged a cunning riot, and severely punished. But if one known man, with divers others unknown, commit a riot, he shall be punished alone; and so was *sir John Towne*, in 2. *H.* 8. And in antient times, if a great man caused an outrage to be committed, he was alone fined to pay for all his servants by the poll. So was *sir Rowland Stanley*, 1. *Eliz.* for twenty-one townships which he drew together to commit a foul riot.

But of rioters, there be four sorts which the court most severely punisheth. The first, when it is committed *cum multitudine gentium:* such was *Langton*'s Case, called the Bristow rebellion; and the suits betwixt *mr. Morgan* of Loternam and *sir William Morgan*, in 2 & 3. *Jac.* and betwixt *Baskervile* and *Scudamore*, 44. & 45. *Eliz.* The second is, when it is committed in the night, being a kind of *latrocinium*; in which case, though it hath been done to avoid force, which was feared by the adverse party, yet was it always severely punished; as in *sir William Hall*'s Case, *ad sect. Ellis*, *M.* 8. *Jac.* The third kind is, when the rioters are disguised as men in women's apparel, or men with vizards; as in *mr. Kidderminster*'s Case, *M.* 4. *Eliz.* where the disguised men were ordered to stand in the pillory in women's apparel, and the women rioters ducked. The fourth is the greatest of all; when an officer procureth a riot under colour of justice, and uses that sword to raise force which is made to suppress it; as in *Broughton*'s Case, 4. *Eliz.* where one *Baker*, a constable, being to raise twelve or twenty persons to aid the sheriff, levied two hundred men in arms, and was sentenced to the stocks and pillory. And justices of the peace, which by colour of their warrants have caused riots to be committed, have been severely punished; as in *sir John Brett*'s Case.

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THE acts of parliament giving allowance to these punishments are, 13. *H.* 4. c. 7. 8. *H.* 6. c. 24. and 1. *M.* and 1. & 2. *Philip & Mary.* The first two require certificates to be made by the justices of the peace to the king and his council; the latter make the assembly (if they depart not upon proclamation) felony, which is above the capacity of the court. But these certificates are not binding or concluding to the persons, but in the nature of a presentment, whereunto every man is allowed his excuse or defence. But I find that in former times they were much more used than now they are; and then the court upon the certificate used to commit the rioters to the Fleet. So in 2. *H.* 8. one *John Lowther* and *Gilbert Wharton* were committed to the Fleet for riots certified by the justices of peace of the county of Westmoreland. And in 2. *Eliz. Francis Jervis* and others were sentenced and fined upon the certificate of the *lord Wentworth*, and other justices of the peace of the county of Suffolk: but it appeareth upon the record, that upon their examinations they confessed the riots; so the certificate did but induce the court to examine it, and they were sentenced upon their confession.

BY the same act of parliament, 13. *H.* 4. the justices are to make inquiry of the riot within the month; and it was usual in all great riots which were sentenced in *Philip & Mary*'s times, and queen *Elizabeth*'s time, that the court commanded the king's counsel to put in an information against the justices of peace next adjoining. And so it was done against *Grasseley*, *Worley*, *Robinson*, and other justices in Staffordshire, for a great riot committed at Litchfield; where they excused themselves, that there was no complaint made unto them: and although it be not contained in the words of the statute, but that they should at their peril make inquiry, yet it was held to be the intention of the law, that if a complaint were not made, they were not under the penalty of the act of parliament.

parliament. And although the act of parliament be, that two justices of the peace shall go with the sheriff or under-sheriff to suppress the riot and apprehend the rioters, yet 14. *H.* 7. f. 9. *Fineux*, chief justice, holds, that any one justice may suppress the rioters, and commit them without tarrying for his fellows; but he cannot make enquiry of the riot, nor assess a fine upon the rioters, nor record the force upon the view.

For *routs*, they are for the most part most dangerous, for that they arise upon public grievances, as inclosing of commons, making of may-games, as it was in the *earl of Lincoln*'s Case. And I have heard, that *Henry earl of Lincoln* in a private discourse said, that the *earl of Essex*'s insurrection in London was but a rout, but that he durst not but find it treason (as he then said). But by the statute of 7. *R.* 2. c. 8, they were declared traitors.

Unlawful *assemblies* are not punished with such severity as riots and routs, and yet are many times punished. It is true, that no time or place privilegeth a man but that he may commit a riot, because it is only of unlawful things; and if a man assemble men together in his house, and they be armed, it seemeth not to be unlawful, for it may be he heard he should be assaulted, and his house is his castle. But if he be threatened or menaced, he may not ride abroad with a company of men armed, as it is held in 21. *H.* 7. c. 39. and so adjudged in *sir William Morgan*'s Case. And it seemeth by *Keble*, 3. *H.* 7. that an assembly of men is not punishable, if nothing be done, unless the assembly be *in terrorem populi*.

Forcible *entry* or *detainers* have ever been punished with great severity. But it is resolved, that any man may keep his possession and maintain the same with force, either of lands or goods; and if any man will come forcibly to take away my goods, I may strike him, as it appears by 9. *E.* 4.; and if my goods be wrongfully taken away, I may take them again by force; for so it is held 7. *H.* 6.

 f. 14.

PART II. f. 14. And the reason is, for that goods are not within the statute of 5. *R.* 2. c. 7. whereby it is forbidden to enter forcibly into any lands, although a man have a good title. And whereby the statute 8. *H.* 6. forcible detainer is allowed only unto him who hath had three years quiet possession, in 3. & 4. *Philip & Mary* in this court it was held, that if a man be thrust out of possession, and upon complaint is restored, he cannot afterwards justify the detaining with force. Or if a termor which hath been in possession twenty years be expulsed utterly, he cannot regain his possession with force. In 4. & 5. *Philip & Mary*, *Dyer* 16. it is said, that a woman may defend her quarantain with force, for that she is in the possession of the estate her husband had. And it is to be observed, that although justices of peace may upon their view record a force and commit the offenders, yet they cannot make restitution without they empannel a jury and make an enquiry, and the force be found, as it was adjudged in *sir John Brett*'s Case. And a denial to open a door to a justice of peace is a forcible detainer in the law (as it was adjudged in the Case of *the King's Attorney* against *Stone*), for the which a justice of peace may commit a man, but can restore no possession thereupon. But after an enquiry made and found, and traverse tendered, the justices of peace may either grant restitution or deny it, at their pleasure, as it was held *Dyer*, 2. & 3. *Philip & Mary*, f. 127. Yet no other justice of peace but one of those that was present at the enquiry can grant a *supersedeas* of a writ of restitution awarded by them which were present, as it is in 2. & 3. *Eliz. Dyer* 187. And I find that in *M.* 2. *Eliz. sir Uriah Brereton*, *sir William Davenport*, *George Calverley*, and *John Dutton*, four justices of peace of Cheshire, which were not present at the finding of a force betwixt *Hurleston* and *Dare*, and yet awarded a *supersedeas* to discharge a writ of restitution which was granted by the justices who made the inquiry, they were fined for it, and the possession

ſeſſion ſettled according to the writ of reſtitution which was firſt awarded.

AND in the caſe of reſtitution of goods forcibly taken away, the ſame hath uſually been done by the oath of the party, for he can beſt tell what he loſt, and in his own caſe his oath ſhall be taken *in odium ſpoliatoris*. And ſo it was ordered in *Chamberlin*'s Caſe, 4. & 5. *Philip & Mary*; where it may be obſerved, that he did not only ſwear what he loſt, but what the goods were worth which he loſt; and the value was reſtored him according to his own oath.

I AM in order now to ſpeak of *duels*, which is a ſingle fight only betwixt two; and that is either *duellum temerarium*, or *duellum per breve directum*, which was an antient Engliſh trial. The judges have varied heretofore in opinion, whether this were puniſhable at the common law or in this court? And *Coke* ſaid, that *delinquentes iracundiâ provocati puniri debent*, &c.; but the *lord Egerton* held it puniſhable by all laws. Howſoever, it is moſt ſure that a challenge to ſingle combat hath been ever puniſhable. So it was held, betwixt *Wharton* and *Eleter* about 43. *Eliz.* and in *ſir William Morgan*'s Caſe before ſpecified, before any proclamation: and the reaſon then given was, becauſe it was a preparation to murder; for if a man endeavour to murder or poiſon a man, that endeavour is puniſhable in this court, although it never came in act. But ſince the edict and proclamation, his royal majeſty, in the Caſe of *Chriſtmas*, pronounced a ſentence upon the breach of the edict, where the offenders were committed to the Tower, and fined a thouſand pounds a man. And ſince, in *Ivy* and *Moody*'s Caſe, a ſcurrilous meſſage to provoke a quarrel was here ſentenced; and it ſeemeth, that the giving of the lie to the intent to provoke a quarrel betwixt men of equality, is puniſhable in this court. But if the lie be given by a ſuperior to an inferior, betwixt whom there is a juſt cauſe of conteſtation of truth and falſehood, it is no offence here puniſhable: as when a man is charged

PART II. with a crime and denieth it, and the other giveth him the lie. And so it was held lately in *Gookin's* Case.

WAYLAYING a man to assault or beat him, is an offence ever held worthy of the sentence of this court: howsoever it be, but man to man they who shall so do, are in the number of *insidiatores viarum*, who in 7. *H.* 8. in the time of the lord cardinal were not thought capable of enjoying the benefit of sanctuary. In 27. *Eliz. Lodowick Grevill* lay in wait for *sir John Conway* at Temple-bar, and beating him with a bastinado, was punished for it. And if a man shall by any train draw a man to his house, as suspecting some familiarity betwixt him and the wife of him who so inviteth him, and shall assault and beat him, he shall be severely punished; and so was *sir Humphrey Tufton* at the suit of *mr. Nevill*; for this is a laying in wait for him: but if it appear plainly that he did abuse his wife, *quære*; for the court was much divided in this case.

ASSAULTS made upon privileged persons (men of the long robe) have been severely punished in this court. A courtier assaulted and hurt *mr. recorder Fleetwood*; he was fined, and put out of the queen's service. *Mr. serjeant Williams* being desperately assaulted by one *Watkin*, against whom he had been of counsel, the offender in *M.* 44. *Eliz.* for attempting to stab him, was sentenced to lose his ears, and perpetually imprisoned during his life. In like case *sir Edward Wingfield* was fined for offering to assault *sir Edward Coke* in the street; and many others for assaulting churchmen.

§. IX. OF MAINTENANCE.

THE laws have been ever strict against maintenance in all ages. They began with the English lawgiver *Edward* I. 1. Westm. c. 25. 28. but these laws concerned the king's officers; and ministers observing the best course of reformation to begin at home, and the punishment in this court at the king's pleasure, stat. 2. *Westm.* c. 28. extended further to

to the chancellor, treasurer, and their clerks. Statute 1. *E.* 3. c. 14. stretcheth to all great men of the land, and to inferior persons, and mentioneth the particular kind of writing letters. Statute 20. *E.* 3. c. 4. forbiddeth maintenance in the king's servants, queen's, and prince's, and in all other persons; and their punishment is, that their bodies, lands, and goods shall be at the king's pleasure. By stat. 5. *R.* 2. c. 4. the king's counsellors and all other his officers, or any other inferior persons, were forbidden to maintain quarrels, and that upon pain of being ransomed. The 32. of *H.* 8. c. 9. includeth champerty and embracery of jurors, by letters or promises, and maketh the penalty of such buying to be the value of the lands bought, and the complaint is to be within one year after the offence committed; which law is an affirmative law, and keepeth on foot all former acts of parliament: and therefore if the suit be brought after the year, it must be laid generally against the laws and statutes, and not upon this law. But these laws are to be understood of such kind of maintenances which are justifiable; as if I have the reversion or remainder of land, I may maintain a suit concerning that land, because it is mine own interest. So may the feoffor and feoffee in use maintain a suit concerning the land. If one be indebted unto me, and deliver me an obligation made to him by another for satisfaction of my debt, I may sue this in his name, as it is in 15. *H.* 7. c. 2. If I grant to *B.* that if my tenant for life die he shall have my land for twenty-one years, *B.* may maintain suit for this land by reason of his possibility, as was held 9. *H.* 6. c. 64.; but if I buy an obligation and sue it, that is maintenance, 37. *H.* 6. c. 17. One that is allowed a curator of orphans goods in court christian, may sue in chancery for those goods, as it was adjudged in *Cannon*'s Case. It is lawful for any man to disburse money in the prosecution of any cause for the king, as an indictment or any information in the exchequer or Star Chamber on the king's part, as it

was

PART II. was held in *Deringe* and *Bettingham*'s Case; and therefore the maintaining of suits in the Star Chamber, mentioned in the said statute of 32. *H.* 8. are to be understood of the defendant's part; for all suits on the plaintiff's part are the king's suits, and to maintain the king's attorney's suits was adjudged no maintenance in *sir George Reynolds*'s Case; and to maintain a relator in a suit was held no maintenance in *Rose*'s Case *ad sect. attorn. ex relatione Floyde*. A kinsman may assist a kinsman in his suits; but the chief justice *Lee* held, in *Cannon*'s Case, that the nephew could not disburse money for the uncle: *tamen quære*. And *Coke*, attorney-general, charged the *lord Sheffield* for standing in court to hear *sir Robert Dudley*'s Case, being his brother by the mother, as a countenancer and maintainer of the cause; but it was held an unjust charge in divers respects: and it seemeth by the book of 15. *H.* 7. that deeds of charity cannot be interpreted maintenance; and yet if a counsellor shall speak in causes without fee, as an assignment in *formâ pauperis*, it is held maintenance, although perhaps he knew the party poor. For maintenance in buying titles, it is doubted, *Dyer*, 34. *H.* 8. whether one in remainder may buy a pretended title to gain a possession from the true tenant of the land in possession? But if land be in question in chancery, it is not champerty to buy the land hanging that suit, or hanging any action of trespass at the common law; for such suits may still be kept on foot to keep the owner from selling, as it was held by the *lord Egerton* in the Case of *sir Rowland Dymock* and the *earl of Lincoln*, and in the Case between *sir John Stafford* and *sir Thomas Throckmorton*, *M.* 3. *Jac.* It is no maintenance for the tenants of a manor to join together to maintain their customs, as the judges held in *Dunch* and *Doyly*'s Case. But the *lord Egerton* held, that if a tenant prescribe that he and all those whose estate he hath in that tenement have used to have common in certain grounds, the rest of the tenants of other tenements cannot maintain that suit, because it tendeth to the particular. But the judges were of another

opinion;

opinion; for they ſaid, that every tenant muſt ſo preſcribe for his ſeveral tenements. But where the pleading is, that *infra talem villam talis habetur conſuetudo*, all in the town may maintain their cuſtom, So it hath been much queſtioned, Whether the pariſhioners might with a common purſe maintain their cuſtom for tything, by reaſon that every man's ſuit is particular? But the former caſe over-ruleth it. And yet tenants or pariſhioners may not tie themſelves by writing or by oath to maintain any other's ſuit, for that was ever held unlawful; and ſo adjudged in the *lord William Howard*'s Caſe againſt his tenants in Cumberland, Yea, an agreement to maintain a ſuit and to divide the benefit of it, is maintenance at the common law, although no ſuit enſue; and ſo adjudged in *Egerton*'s Caſe againſt *Starky*, *Hil.* 14. *Jac.* and there ſaid, that it is the worſt maintenance, becauſe it giveth fuel to all ſuits. And it is proved by the caſe of *Dyer*, 1. *M.* 5. if a juror takes money to give a verdict, and yet he gives no verdict, or a man undertakes to maintain, but doth not maintain, they are both puniſhable; and the Old Book 30. *Aſſize* there cited for proof. As a man may not buy a title hanging the ſuit, ſo may he not after judgment given in it before execution or a writ of error be brought to reverſe the judgment; and ſo it was adjudged in *Mouſe* and *Weaver*'s Caſe, *Mich.* 44. & 45. *Eliz.* where the caſe was, that a recovery was had in an aſſiſe in a court baron againſt *Mouſe*, and thereupon judgment given but by order out of the exchequer execution ſtayed, and the plaintiff and defendant by order of their interrogatories pleaded. *Weaver*, after the judgment, ſpent money in the ſuit in the exchequer, and it was adjudged maintenance. To take a leaſe of lands to the end to defend the title in a ſuit to be brought, was adjudged maintenance in *ſir Oliver Lee*'s Caſe againſt *Lidyard*, in *P.* 4. *Jac.* and to maintain a ſuit of goods to have part, is here puniſhable.

PART II.

FOR preparing, labouring, or ſoliciting of jurors, and their being laboured, cometh here neceſſarily to be ſpoken of,

PART II. of. It is a dangerous kind of maintenance; and it is clear that the writing of a letter to a juror to appear and to do his conscience, was held embracery. *Quære*, for that embracery is properly betwixt the party to the suit and the juror, and not betwixt strangers? as in *sir Thomas Lucas*'s Case, where he had nothing to do, for *miscuit se alieno.* But the party himself may labour the jurors to appear; yet if he acquaint them with the state of the cause, or they promise to stand to him, as in the Case betwixt *Ognell* and *Parsons*, *M.* 33. *Eliz.* the jurors were ordered to stand on the pillory at Westminster and at the assizes, and the verdict to be of no force. And so in the Case where the king's attorney was plaintiff by relation, *Haulest* against *sir Thomas Brereton*, the delivering of a breviate of the cause to a juror hath been held an offence, and severely punished in *Tunbridge*'s Case. But in the Case betwixt *Becket* and *Rashley*, a justice of peace in Cornwall, a juror coming to him about business for the king, *mr. Rashley* spoke to him to appear; and there lying an exemplification on the table before him, said, "there was that "that must end the controversy, but read it not;" this was held no embracery. So Coke said, it was lawful to tell the juror what the issue was, being no more than was contained in the record of *nisi prius.* And so to speak of a record and make no inference thereupon, was no offence.

Upon the hearing of a cause of that nature, I remember the *lord Egerton* told the court, how that he being sollicitor general to queen *Elizabeth*, and standing behind the lords, and namely behind *Robert earl of Leicester*, when a cause was heard concerning the writing of a letter to a juror to appear, the great earl asked if that were a fault, and swore he had done so a hundred times. I could not by the way, but note how necessary a thing it is, that the great lords of the kingdom should not neglect the study of the laws of their own country, where they are to sway and govern, and where, by their example in breach of law (perhaps

through

through ignorance), the whole multitude follow, as led by their example or authority. PART III.

THE labouring of jurors before they are empannelled is as well punishable as after; for *M.* 31. *Eliz.* three jurors of Middlesex which agreed to acquit *Lodovick Grevil* if they should be of his jury to try him, wore papers in Westminster-hall, and were grievously fined. So also if they accept money for a reward after the verdict given, it is an offence punishable in this court, although out of the statute of *Decies tantum*, as is proved 39. *Assize*, pl. 19. Neither is it necessary that jurors should take, promise, or receive money, and be imbraced; both which are required in a *Decies tantum*, as appears 39. *H.* 6. c. 31. for otherwise the action will not lie. But if a juror have a good bargain in lands, or any chattels, for to yield favour in his verdict, it will be punished, as may appear in *Fitzh. Decies Tantum*, pl. 19. Infinite are the punishments of jurors and those which have imbraced juries; and the question now is not thereabouts, but only concerning the jurisdiction of the court, Whether the truth or falsehood of a verdict betwixt party and party may be examined? which I have ever held to be examinable as in aggravation; for it is a greater offence to give a verdict against an evidence than according to an evidence, although the party be prepared; for as the reverend *lord Egerton* would often remember, *Vendere justitiam insania est, vendere injustitiam nequitia.* And therefore to examine the truth of the verdict as an accessary argument to prove that the jurors were corrupted (as I urged it in *Atwood's* Case), I see no inconvenience; but my lord *Verulam* received it at that time. But of this subject I have spoken before.

I SHALL yet add a word or two concerning what persons may maintain by profession; and I find that by profession only a barrister or counsellor or attorney may maintain a cause at the bar, or in prosecution, and their clerks. And upon an action brought upon the statute of

32. H. 8.

32. *H.* 8. on an information, the one may justify that he is *eruditus et in lege peritus*, and for his fee maintained the cause, *prout ei bene licuit*; and the other, that he is an attorney in that court, and sworn, and that the party retained him, and so justify. But for the first, I have heard a traverse taken to a counsellor's plea to an information in the exchequer, *absque hoc quòd praedictus defendens fuit in lege peritus*; and that was one *Prince*'s Case of Shrewsbury, who was the only man in his age that was allowed to practise at the bar by letters patent under the broad seal, and never called to any inn of court, which I suppose was a reason of the traverse. But if a counsellor will give advice to vex the subject, or deceive private persons or the king, or to break a good wholesome statute law, mr. *Lambert* holdeth that punishable here. But sure it is, that if a counsellor or attorney will take upon him to compass a jury, that is punishable. And so it was held in *Bradley*'s Case, who escaped by faint proof; he being assuredly the greatest and most notorious preparer of juries of any attorney in that part of the kingdom; under the burthen of whose corruption by that practice the county of Salop hath groaned many years, and if the lord *Egerton* had lived, would have been delivered ere this time. So that the rule is, that serjeants and counsellors (who for aught that I can find in the Book of Entries are all one in this case) may maintain, so long as they keep within the lists of their duties to their clients; and so must attornies do also; for an attorney in the common pleas cannot justify the following of a cause in the exchequer, as it was adjudged in *Postern*'s Case, who was sentenced for it *M.* 45. *Eliz.*; no more can a clerk of the chancery the following of a cause in the Star Chamber, as it seemeth: and yet that may be a question, for being allowed to write to the board to be a clerk to the lord keeper, the clerks of the Star Chamber being his lordship's clerks also. But in our age there are stepped up a new sort of people called solicitors, unknown to the

records

records of the law, who, like the grasshoppers of Egypt, devour the whole land; and these I dare say (being authorised by the opinion of the most reverend and learned lord chancellor that ever was before him) were express maintainers, and could not justify their maintenance upon any action brought: I mean not where a lord or a gentleman employed his servant to solicit his cause, for he may justify his doing thereof; but I mean those which are common solicitors of causes, and set up a new profession, not being allowed in any court, or at least not in this court, where they follow causes; and these are the retainers of causes, and devourers of men's estates by contention, and prolonging suits to make them without end.

There are yet another sort of people which may maintain one another's cause; and that is, one defendant may maintain the suit of his fellow defendant; for otherwise his own cause may have prejudice: nay, if a bill be preferred against two for one offence, and against one of them for another offence, he that is not charged may maintain the whole suit, for the prosecution in form looketh not to the matter but to the ordinary course; and I am of opinion, that the party may examine witnesses in the latter case, in the cause that he is not charged. And my reason is, because that if he be innocent of the offence in which he is charged jointly with the other, yet if his fellow should be sentenced by the course of the court, he loseth his costs, and there is no reason but, if he may receive advantage by it, he may do his endeavour to make his fellow's cause appear truly to the court; and this more properly than *amicus curiæ* may at the common law.

§. X. OF FRAUD.

The common law of England hath evermore abhorred covin and deceit; so that those things which are most favoured

PART II. voured in law, yet being mixed with fraud, they are made tortious and unlawful; as *sir Edward Coke* hath declared in *Farmer's* Case: There is no question but the law punished fraud before the making of the statute 13. *Eliz.* c. 5. but the proviso in that statute, that false deeds made *bona fide* should not be construed within the law to be fraudulent, hath begotten more fraud than former ages ever heard of; for to colour their wickedness it is now usual to make a pretext of some poor consideration, thinking thereby to perfect their fraud; and that was punishable before that law, as appeareth in *Pauncefort's* Case, 3. *Rich.* fol. It may be an hard matter for me to describe what will be a fraudulent deed within the law or statute. And for that *Twyne's* Case must yield our direction, which we must take as it is reported by *sir Edward Coke*, making a cause to be fraudulent as it pleased him in the time of his potency, which will serve for an example as well as another.

ONE *Pierce* being possessed of a term for years of lands of good value in Hampshire, and of a stock of corn to a great value, was indebted to *Warberton*, a pensioner to queen *Eliz.* in 200l. and to *Twyne* in 400l. *Warberton* sued his bond. *Pierce* conveyed all his corn, cattle, and goods whatsoever to satisfy *Twyne's* debt, upon condition to pay at a day; but *Pierce* during the time did continue the possession, yea and marked the cattle as his own. *Warberton* had judgment and execution, and *Twyne* understanding of it, resisted the execution by colour of his deed. And this deed was adjudged fraudulent, first, for that it was general of all his goods and chattels; secondly, for that he kept the possession after the grant; thirdly, for that it was never published till the sheriff's coming; fourthly, for that it was made after the suit commenced for the first deed; fifthly, for that there were some unlawful clauses in the deed; sixthly, although it were made upon good consideration, yet was it not made *bonâ fide*, whereas both are within the provision of the statute; and because it is but a word, I will

will explain this laſt firſt, for it ſoundeth ſomething inſenſible. But the caſe of bankrupts explaineth it plainly. Where a man being indebted to many will deliver his goods to the ſatisfying of one expecting relief from him, and ſo the reſt are wholly unſatisfied, this delivery (although there were a juſt debt) is fraudulent to the reſt of the creditors, who ought to be all equally ſatisfied.

For the explanation of all the other points, I muſt put another caſe, whereby it will appear, how far forth the former rules will hold water. *Paramore* was indebted by obligation to *Moore*, *Burlemacke*, and others, to whom *Moore* ſtood engaged for him in 500l. and ſtood in bond alſo to *Speak* in 1000l. by recognizance for a juſt debt. He was poſſeſſed of the great farm of Michaeldever in Hampſhire, and of a ſtock of corn and cattle to the value of 1000l. In February he conveyed all his goods and moveables in Michaeldever to *Burlemacke*, upon condition for ſecurity for his money at a day; but, by his ſervants, ſowed the ground, ſhore the ſheep, ſold the wool, and had formerly given *Burlemacke* other ſecurity for the ſame money. The beginning of May *Burlemacke*'s man entered by virtue of aſſignment, ſecretly. May 26, *Speak* ſued a *ſcire facias* upon recognizance, and upon the 2d of March he had judgment and execution in Trinity Term, and took out an *elegit* to the ſheriff of Hampſhire, who took the goods in execution, and was reſiſted by *Moore* by publication of the deed. And it was adjudged that this was no fraudulent deed. Firſt, *All his goods and moveables in Michaeldever* is a general of an eſpecial, and not *genus generaliſſimum*, to be intended all the goods he hath, whereby he left himſelf nothing, as it was in *Twyne*'s Caſe. Secondly, That it was lawful for the grantor to keep the poſſeſſion until he faileth of his payment; and that agreeth with the *lord Dyer*'s opinion in the *Almoner*'s Caſe. Thirdly, That the grantor needed not to publiſh the deed until there is cauſe given him. Fourthly, Although he have a former

 ſecurity,

PART II. ſecurity, yet he may take a latter without fraud, and ſo have two ſtrings to his bow.

I DARE not comment upon theſe two judgments, for I know they are notorious; it will eaſily appear where one was extended and the other diminiſhed; but the rules ariſe plainly out of either whereby a fraudulent deed is manifeſted. And this was ever agreed for a conſtant ground, that a feigned or no conſideration will make a deed fraudulent, but a good conſideration will not defend a deed from fraud, as I ſaid before in the ſixth reaſon of *Twyne's* Caſe: for although it were at firſt made truly, yet if it be after fraudulently uſed, it deſtroyeth the whole force of it, as it was adjudged in *Burrell's* Caſe; which was, the grandfather made a leaſe of his land to the father of 1000 years upon covenants of marriage; the father before the death of his grandfather aſſigned his leaſe to his ſon under age, and others, for payment of his debts; the grandfather died, the father continued the uſe and poſſeſſion of the lands, and ſold the reverſion for a valuable conſideration to *Burrell*, who entered, and was thruſt out of the ſame by virtue of the aſſignment of the leaſe; and the ſame was adjudged fraudulent, and within the ſtatute.

ANOTHER ſettled ground there is, That howſoever a fraudulent deed ſhall be damned againſt the creditors, yet it is good againſt the grantor; ſo that where deeds are damned as fraudulent, it muſt be underſtood that it was only againſt him by whom they were made to deceive; for a deceiver otherwiſe would take advantage of his own wrong.

I SHALL hereafter touch, that an infant, or a *feme covert*, ſhall be puniſhed by this law, as it was in the Caſe of *ſir William Wiſeman*; and that is upon the ground of my lord *Dyer*. That ſtatute binds all perſons but ſuch as are excepted; and then deeds made for the protection of the eſtate of one that intendeth to become a fugitive, is expreſsly within the law; and that was *Whittingham's* Caſe.

But

But if a man be to fight a quarrel upon a duel, and maketh a deed for the protecting of his estate if he should kill his adversary, whether this deed be fraudulent or not in itself, is a question in *Hayward's* Case, but referred to the judges, and never certified.

I HAVE observed, that in divers cases an agreement and practice to do an unlawful thing, although the same were never put in execution, was held to be punishable; as an agreement to maintain a suit and, to share it, was held the worst maintenance. But in the Case of one *Day*, 45. *Eliz.* it was agreed, that an agreement that a fraudulent deed should be made, but the same never made, that agreement was no offence; and I conceive the reason to be, because the deed is not *malum simpliciter*, but *secundum quid*; for it is only bad in respect of the creditor, or otherwise that deed is good.

AND this court hath power as well as any other to avoid a judgment had by fraud, and to command the record to be vacated, as well as the Judges of the common pleas did in *Harrison's* Case, in 8. *Eliz.* where the judges, finding the judgment to be fraudulently confessed, made a *vacate* of it. As when one that was adjudged at the quarter sessions at London to be whipped, and being committed to the compter confessed a judgment of 200l. to an attorney of the common pleas, whereupon he brought him by *habeas corpus* to the common pleas bar, and there he was committed to the Fleet in execution, which was out of the power of the city of London, no question but this court might have caused this judgment to have been vacated, and the prisoner to be remitted to his punishment. And I know no reason but the same course may be held upon all judgments where young men are drawn to confess a judgment for a security without any consideration, of which sort there are innumerable; for surely as to subsequent just deeds, they are as fraudulent.

§. XI. OF LIBELLING, AND SCANDALOUS WORDS AGAINST NOBLES.

In all ages libels have been feverely punifhed in this court; but moft efpecially they began to be frequent about 42. & 43. *Eliz.* when *fir Edward Coke* was her attorney general. But it muft not be underftood of libels which touch the alteration of government; as,

The Cat, the Rat, and Lovell the Dog,
Rule all England under a Hog;

or the work of *mr. Williams* of the Temple, not long fince executed at Charing Crofs; but libels againft the king's perfon and nobles have been here examined. So was that in 7. *H.* 8. at which time, for the difcovery of the hand, the books of all the tradefmen in London were to be viewed, with two aldermen and a knight appointed by the council to confer the hands and manner of writings at the Guildhall, whither they were to be brought fealed for that purpofe only; and this done for the difcovery of the author.

Libels are of feveral kinds; either by fcoffing at the perfon of another in rhyme or profe, or by the perfonating him, thereby to make him ridiculous; or by fetting up horns at his gate, or picturing him or defcribing him; or by writing of fome bafe or defamatory letters and publifhing the fame to others, or fome fcurvy love-letter to himfelf, whereby it is not likely but he fhould be provoked to break the peace; or to publifh difgraceful or falfe fpeeches againft any eminent man or public officer. Of each of thefe I fhall only remember an example or two, and then leave it to the fearch of infinite precedents.

For a libellous rhyme, *Bland* againft *Davies and Others* was an unhappy libel in verfe againft the plaintiff and his wife,

wife, which *Davies* took upon him to make, being a barber in London, and was juſtly ſentenced to be whipped for helping himſelf, for aſſuredly he was not able to have written ſuch a line, for which he was ſentenced about 1. *Jacobi*; and before that *Holloway*'s Caſe in Chancery-lane; and in 37. *Eliz. Barney* againſt *Farmer*, two juſtices of peace, one againſt another. The perſonating of the *earl of Lincoln* in a play was ſeverely puniſhed; and *doctor Millway*'s Caſe is not forgotten, wherein the defendants were ſeverely puniſhed; yet the *lord chancellor Egerton* ſaid, that he held not the doctor in that buſineſs to be St. Auguſtine.

PICTURING or ſetting up horns at a man's gate was ſeverely puniſhed in the Caſe of *Horſey* v. *Aſtley*, 33. & 34. *Eliz.* And in the great libel of *Wells*, there being a fame againſt a townſman that he lived incontinently with the wife of the plaintiff *Hole*, in a May-game uſed yearly in that town they brought a man riding with a board before him on which was a pair of nine-holes, one riding at the one ſide ſaying, *He holes for a groat*; the defendants being many in number were ſeverely puniſhed for this paſtime.

AND for ſcandalous letters, the precedents are infinite. One of the firſt ſent to the perſon himſelf was *Lloide*, regiſter of the biſhop of St. Aſaph, againſt *Peter Breverton*, clerk, ſentenced *M.* 2. *Jac.* and yet the defendant would have undertaken to have proved the contents of the letter to have been true, he thereby charging him with bribery and extortion in his place. Then was *ſir William Hall*'s Caſe againſt *Ellis*, a ſcoffing letter, and ſeverely puniſhed. A ſcurrilous letter from one mean man to another, was *M.* 12. *Jac.* ſentenced at the ſuit of *Barrows* v. *Lyelling*, and the ſame only ſent to the party himſelf. Nay, *Norton* v. *Roper*, 1. *Jac.* was ſentenced for writing a ſcoffing letter by one rival to another.

BUT if the letter be written to a man in authority, as in *Trin.* 32. *Eliz. Hide* v. *Smalley* for writing a letter to the

PART II.

mayor of the borough of Wallingford, charging him with injuſtice, that was ſeverely puniſhed; and a letter written by *Booth* to *ſir Edward Coke*, charging him with ſome cautelous courſes in proſecuting a forgery, was ſentenced to the pillory: nay, diſgraceful words and ſpeeches againſt eminent perſons have been grievouſly puniſhed in all ages. In 8. *H.* 8. one *Scott*, a juſtice of peace of Surrey, was puniſhed for ſpeaking certain words againſt the lord cardinal; and in the ſame year one *Knivett*, and one called *Long James*, for uſing uncivil words to the ſheriff of London, in the wreſtling-place at Clerkenwell. And 12. *H.* 8. one *Saye* was ſentenced for raiſing a falſe report of the lord *Dacres*, of South. And in 7. *H.* 8. *Lucas*, a privy-counſellor, was ſentenced for ſpeaking ſcandalous words againſt the lord cardinal. And in the days of queen *Elizabeth*, one ſentenced to the pillory for ſaying the *lord Dyer* was a corrupt judge; and *George Vernon's* Caſe, at the ſuit of *mr. ſerjeant Crew*, for ſpeaking againſt *ſir Henry Townſend.*

And the *publiſhers* of libels are as ſeverely puniſhed as the *makers*; therefore it is uſually ſaid, that it were a puniſhment to a libeller if no man would publiſh it. Therefore, to hear it ſung or read, and to laugh at it, and to make merriment with it, hath ever been held a publication in law.

There are two groſs errors crept into the world concerning libels: 1. That it is no libel if the party put his hand unto it; and the other, that it is not a libel if it be true; both which have been long ſince expelled out of this court. For the firſt, the reaſon why the law puniſheth libels is, for that they intend to raiſe the breach of the peace, which may as well be done, and more eaſily, when the hand is ſubſcribed than when it is not. And for the other, it hath ever been agreed, that it is not the matter but the manner which is puniſhable; for libelling againſt a common ſtrumpet is as great an offence as againſt an honeſt woman, and perhaps more dangerous to the breach of the peace: for

for as the woman said she would never grieve to have been told of her red nose if she had not one indeed, neither is it a ground to examine the truth or falsehood of a libel, because it is *sub judice* whether it be a libel or not; for that takes away *subjectum quæstionis*, and determines it to be no libel by admitting the defendant to prove the truth, and the defendant in that case ought to plead a justification, and demur in law; but if he pleads not guilty, the question is gone whether it be a libel or not. The writing of a letter to the nearest friend of a person, thereby to draw him into displeasure, and work him any disinherison or prejudice, hath been held an offence deserving the sentence of this court. And so it was held in *Peacock*'s Case and *Reynolds*'s Case, and many others. But at this day the offence of writing provoking letters is much encreased by his late majesty's * edicts and proclamations published to suppress all provocations of quarrels, although the words or writings tend in strictness of law to be libellous. I could spend much time in the discourse of the libels of these days, but *sir Edward Coke* hath shortly and pithily set down the diversities, who (I think) in his time was as well exercised in that case, as all the attornies that ever were before him. Yet cannot I omit the observed course, that in this court a libel made against a dead man shall be punished; as *Lewis Pickering*'s Case, for his scornful libel against that reverend prelate *archbishop Whitgift*: but whether only in this court, or by indictment at the common law also, I am doubtful; for as a trespass to the party it cannot be, and as a scandal to him that is dead in his public service, it hath been adjudged, that words of imputation against a great judge after his death should not be examined, lest the public justice might receive prejudice when he is gone, that should make it appear to be false and scandalous; which was the judges' opinions in *Strowd*'s Case. And yet surely the king may punish

* King James.

PART I. the detraction of his public justice. But this is left to the discretion of good and temperate times. And I desire to observe one difference, which standeth with the rules of law and reason, and which, under favour I have ever conceived to be just, That upon the speaking of words, although they be against a great person, the defendant may justify them as true; as in all actions *de scandalis magnatum*, which are as properly to be sued in the Star Chamber as in any other court, and he shall be there received to make the truth appear. But if he put the scandal in writing, it is then past any justification, for then the manner is examinable and not the matter. In some cases a libel shall not be examined; as where a libel is made against me, and I hold it more prejudice to me to have it published than if it were concealed; as it was held in *Lamb*'s Case, of which I shall take occasion to write a word or two in another place.

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§. XII. OF CONSPIRACY AND FALSE ACCUSATION.

I WILL conclude the particular offences which I shall speak of with this great offence of *conspiracy*, rarely heard of in former times, but in our age grown frequent and familiar. And herein some questions have arisen; as in the Case betwixt *Rochester* and *Solm* it was questioned, Whether if the party is *legitimo modo acquietatus*, he may sue in this court for conspiracy? for *sir Edward Coke* would have maintained, that after his acquittal he was to prefer his indictment at the common law, where conspirators were to have their villanies judged. But the *lord Egerton* did gravely confute that opinion, and open the jurisdiction of this court, manifesting that notwithstanding the party might have his indictment, yet that excludeth not the court of jurisdiction; for in all cases of force or fraud an indictment lieth at the common law; yet this court will proceed for the king also. But afterwards, the evidence being

being read, the case appeared to be, that *Rochester* struck *Solm*'s father on the head, and broke his head. Being a sickly old man. old *Solm* about a month after fell sick and died, and on his death-bed complained of his hurt. *Solm* his son and others his friends indicted *Rochester* for the murder; who, upon his arraignment, being acquitted, preferred his bill for conspiracy: and upon the whole matter the court thought not fit to proceed; for the son had just cause and ground to prosecute *Rochester* upon the indictment, there being a blow, and a death shortly ensuing; and the death of the father, who complained of the blow; and therefore it is no ground to say the jury acquitted him, and therefore your indictment was false; for many times great offenders escape upon indictments, and yet perhaps the prosecution is not without malice (for the truth may be accompanied with malice); and then I know not but every acquitted delinquent may bring his writ of conspiracy; which I the rather touch, because I heard this error publicly broached by a learned man.

But when the party is indicted, and not *legitimo modo acquittatus*, then can no conspiracy lie, as it was adjudged in *Daniel Wright*'s Case. And therefore in the Case of *Baker* against *Hall* and *alderman Lumley and Others*, for prosecuting an indictment against him upon the statute of 3. *H.* 7. for taking away a woman against her will and marrying her, which indictment he avoided by error, and upon hearing it was adjudged that he could not prosecute a conspiracy. Otherwise it is if the party be never indicted, and that either the malice of the adversary cannot prevail to have the indictment found, as it was in *Poulter*'s Case; or the plot be discovered before it come so far, as it was in the Case of *sir Anthony Ashley* *. In both these cases conspiracy will lie in this court; and yet no action or indictment will lie at the common law, unless the party be indicted, yea and acquitted also.

* Coke I. 5. & 8.

THUS

PART II.

THUS then out of these judgments it appears, that this court hath jurisdiction in all cases of *conspiracy* where the common law hath any, and in divers cases further than the common law. And to manifest that this is no usurpation of this court in latter times, I find that in 7. *H.* 8. one *Palin* and *Blackenhall* are there sentenced, for that they did "maliciously and without cause reasonable" (for these are the words of the sentence) accuse one *Cuthbert Laughton* for clipping of money; and in 18. *H.* 8. one *Constance* the wife of *John Young* was questioned for false accusing of *Thomas Young*, his brother, to have made away and murdered her husband, whom she knew to be alive, as appeareth by her own confession before the cardinal; in both which there appears no indictment or acquittal once mentioned to be precedent to the same.

I MUST also observe, that by the common law no indictment of conspiracy can lie but against two at the least; but in this court, if one man falsely accuse another, he shall be here punished, as in conspiracy. And so was *Lee* not long since sentenced and branded for practising subtilly to accuse divers men of great worth to have been guilty of the Powder treason; and so was *Pye* for malicious seeking to indict mr. *Meyrick* of the Temple for felony; in both which cases both the defendants stood on the pillory, and lost their ears, and the one was branded with F. A. in the face.

IT appears by *Fitzherbert* in *Nat. Brc.* in his Writ of Conspiracy, that if a man be falsely indicted for felony, and the same felony be pardoned by a general pardon, although to manifest his innocence he will plead to the indictment, and he be acquitted, and will take no advantage in pleading of the pardon, yet at the common law he can have no action of conspiracy; and the reason there given is, for that his life was not in jeopardy. But there is no question but this court will for the king punish this offence, and hath jurisdiction sufficient, which is proved by the

Cases

Cases before alledged; for before the indictment life could not possibly be in hazard, and yet the offenders were punished. And this complaint of conspiracy doth not only lie in the case where a man is prosecuted for felony, treason, or rape, but where he is indicted falsely and maliciously for any trespass. But especially there be many examples where many have been maliciously indicted for common barratry, because that tendeth to the utter ruin of a man's reputation, which is as carefully preserved in this court as life itself. *Fitzherbert* puts a case where conspiracy lieth, for that a man was falsely presented in the leet for suffering a felon to escape; which, without question, is punishable in this court.

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§. XIII. OF CAUSES HERE EXAMINABLE, NOT OTHERWISE PUNISHABLE.

LEAVING now the particulars, I come to express the great and high jurisdiction of this court, which, by the arm of sovereignty, punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases, or giveth life to the execution of laws, or the performance of such things as are necessary in the Commonwealth, yea although no positive law or continued custom of common law giveth warrant to it. Such are all punishments of breach of proclamations before they have the strength of an act of parliament, which this court hath stretched as far as ever any act of parliament did. As 41. *Eliz.* builders of houses in London were sentenced, and their houses ordered to be pulled down, and the materials to be distributed to the benefit of the parish where the building was; which disposition of the goods soundeth as a great extremity, and beyond the warrant of our laws; and yet surely very necessary, if any thing would

PART II. would deter men from that horrible mischief of encreasing that head which is swoln to a great hugeness already.

If a corporation shall be rent asunder by faction, and that they shall by a wilful and heady practice displace any which ought to be their officers, this court will restore him and punish them; as they did in 17. *H.* 8. to the company of dyers of London. If one troublesome man disquiet the rest of a corporation, this court will punish him: so they did *Dunning*, one of the pewterers, *M.* 3. *Jac.*

Attempts to coin money, to commit burglary, or poison or murder, are in ordinary example; of which the attempt by *Frizier* against *Baptista Basiman*, in 5. *Eliz.* is famous; and that attempt of the two brothers who were whipped and gazed in Fleet-street in 44. *Eliz.* is yet fresh in memory.

Nay, if a man practise to have himself indicted of felony where he may have clergy, to the end to be delivered out of execution, this is punishable; and in 34. *H.* 6. his arraignment was stayed until the king and his council's pleasure were known.

If a young man shall be drawn to the company of a lewd woman, and one as her husband shall enter the room and take him with her, and by this plot shall wrest from him money, land, or leases, this is punishable, as *mr. Lambert* thinketh; or if men shall draw a young man into a continued drunkenness, and in that drunkenness shall draw from him the estate of all his lands, this is punishable, as in the late Case of *Lerckwith.* If a man be outlawed and have his pardon, and yet will cause his goods to be seized as for the king, and thrust them into the hands of a person trusted by him, there to be protected against his just debts; this abuse of the king's prerogative is punishable. A woman practised to have her husband whipped, but the same was not performed; and after her husband's death she married again: his father sued her for this practice; and although the action died with the person at the common

mon law, yet she was severely punished, as it was in *Rayman*'s and *Beckleye*'s Case.

PARTIAL executing of any writs by sheriffs hath been here often punished, as was *sir James Fitz-James* in 5. *Eliz.* To make an unjust and partial sale of goods taken in execution, was punished in the Case of *Beck* and *Tyrrell*, *Hil.* 34. *Eliz.*

A JUSTICE of peace denying to do his duty in granting the peace, or any other thing, or in doing his duty wilfully, maliciously, or corruptly, hath been here ever severely punished; as may appear in all the sentences betwixt *sir Henry Winstone* and *sir* ——— *Throckmorton*, *et è contra*, and betwixt *Alban Stepneth* and *Warren*. But errors in judgment are not punishable.

THE embezzling of evidences by flight or covin is here punishable; so was it adjudged in *Ratcliff*'s Case against *Tudor*, and taking away of a bond of 1000l. sentenced betwixt *Stephen* and *Spencer*, 34. *Eliz.* The opening of passages and maintenance of bridges hath been here enjoined; so was it in the town of *Kingston upon Hull*, 21. *Eliz.* The breach of duty of any of the king's great council, or ministers, is here, and ever hath been here, examinable. So likewise rude and uncivil behaviour, or ill words to a justice of peace or public magistrate, as calling him a fool, &c. An abuse in homagers in court leet who refuse to make presentment according to their duties, was severely punished in 4. *Eliz.* in the cause betwixt the *earl of Arundel* and the *lord Lumley*, where one of the homagers who brought in a blank paper, and said that was their verdict, was adjudged to wear papers at every leet day for seven years.

IF a man employed in the king's service for the defence of the realm shall be arrested for a just debt, whereby the king's service shall be prejudiced, that hath been punished severely in him which only sought legal justice. And in 34. *Eliz.* one *Barney* was sentenced for so arresting *Woodhouse*, a man employed by her majesty.

FOR

PART II. For a man to cause himself to be sued, by which suit a prejudice shall grow to a third person; such was *Starkie*'s Case against *Dodman*, 33. *Eliz.*; and that and none other was the case of *sir Robert Dudley* in suing his man, which called him bastard, in the ecclesiastical court, thereby to obtain a sentence of legitimation; whereby the crown should have lost a great reversion, and some great men after that time a great portion of their estates, which they had purchased after the land was supposed to have reverted to the crown.

In the time of king *H.* 8. this court took great care to punish those that kept public diceing-houses and bowling-allies, and the lord mayor and aldermen had charge to bring them in, and they were punished; as also were *Gerrard* and *Parsons*, who kept unlawful games about 41. *Eliz.* a raging mischief in the Commonwealth, worthy of mr. attorney general's consideration.

And also the inveigling of young gentlemen, and entangling of them in contracts of marriage to their utter ruin, to which no statute made extendeth; as the Case of the *lord Cavendish*, *Chambers*, and others. I remember that in *Dunning*'s Case *sir Edward Coke* delivered for law, that if merchants engross a commodity into their hands thereby to raise the price, that is an offence punishable. And it is true, that in 40. *Lib. Assize*, pl. 38. one raised a report in the country, that the wars were so hot beyond the seas that merchants could not pass, by reason whereof the price of wool was much abated; and he was fined and ransomed before the council of the king; yea and that was by *ore tenus*, upon his own confession.

A man, upon pretence of title, taketh cattle *damage feasant*, and selleth them in a market overt, which for the pretext of title is no felony but a foul trespass, and therefore punishable in the Star Chamber; and that Case was in question betwixt *Hall* and *Spelling*, 6. *Jac.*

If

PART II.

If men in authority punish any one by pretext of their office which in truth ought not to be punished, the officers shall be grievously fined. So were *Skinner* and *Latcher* for whipping of *mrs. Nevill* in Bridewell.

If subtle merchants or tradesmen will draw young gentlemen under age before a judge, or any other which hath power to take a fine or recognizance, knowing him to be under age, he shall be grievously fined. So was *Hide* of Cheapside, *Pasc.* 41. *Eliz.* for procuring one *Strangeways*, an infant under twenty-one years, to enter into recognizance for silks. Yea, the drawing of young gentlemen into security for commodities of tobacco and phillizellas, and such unnecessary stuffs, which they are compelled forthwith to sell away to brokers at half the value, is usually fined; as in late times in the C[illegible] *Woodward* against *Denity*.

If one shall take upon him to be an herald, and without good and lawful authority visit the country, and so draw money from the subject, he shall be severely punished.

If one shall take upon him to be an eschcator without lawful authority, he shall be punished; as one *Day* was, and nailed to the pillory, 4 & 5. *Philip & Mary*. And *Brockard*'s Case is not much differing, who executed his sheriff's place without oath.

Before the statute of 5. *Eliz.* c. 10. there was no law against invocation of evil spirits, and yet in 4. *Eliz. Cocke* and *Bilson* and others were sentenced there for practising of sorcery.

Mr. Crompton puts a case which he saith is there punishable, but I can find no example of it, which is this: Upon an *elegit* the creditor causeth the jury to find more land than in truth the debtor had, to the end he might have *all* the land of the debtor, which the debtor delivered as the *moiety*, and so obtained it: it standeth with great reason that such a practice should be severely punished, and yet the debtor hath no help by course of law for a moiety, be-

cause

PART II. cause the creditor is in by matter of record; and against the jury there lieth no attaint, because it is but an inquest of office: and I conceive that this is the reason why it should be here punishable, and the injured person redressed; for a false verdict in a court baron shall be here punished, as I have said before; and the reason of that is, because no attaint lieth, and so the party should be without remedy.

BUT it may be thought that *Brent*'s Case in 5. *Eliz.* was of a strange nature; where a complaint being made to this court that *Brent* consumed his estate in lewdness, and that his wife and children had not wherewithal to maintain them, the court directed the master of the rolls and the under treasurer to settle him in a course certain, and the court ordered him to obey it; which order, though it soundeth merely civilly, ariseth out of this crime; and *interest reipublicæ ne quis suâ re malè utatur*; and it may be *Brent* had been a lunatic *per lucida intervalla.*

SOMETIMES a dishonest breach hath been here punished, as in *Trin.* 34. *Eliz.* in the Case betwixt *Gooche* and *Worlich*; where the defendant being bound as surety for the plaintiff, and having goods delivered unto him to discharge the principal, suffered the bond to be forfeited, and then to be sued, and thereupon put the counterbond in suit, thereby to gain the forfeiture of that obligation. And in *M.* 35. *Eliz.* the like Case was sentenced betwixt *Smith* and *Woolestall.* Nay, in cases where the common law denieth the party to sue, this court doth enable him; as in the case of Revivor, Riot, or Traverse, which the court adjudgeth, contrary to the opinion of the judges of England.

INFINITE more are the causes usually punished in this court, for which the law provideth no remedy in any sort or ordinary course, whereby the necessary use of this court to the state appeareth; and the subjects may as safely repose themselves in the bosoms of those honourable lords, reverend prelates, grave judges, and worthy chancellors, as

as in the heady current of burgeſſes and meaner men, who run too often in a ſtream of paſſion after their own or ſome private man's affections, the equality of whoſe juſtice let them ſpeak of who have made trial of it, being no ſubject fit for me to diſcourſe of.

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§. XIV. OF SUCH OFFENCES AND ACTIONS AS BY THE CONSTITUTIONS AND STATUTES OF THE REALM ARE HERE EXAMINABLE.

HAVING ſpoken of ſuch crimes as are examined in this court, although no conſtitution or law have been made for them, I ſhall in the next place a little diſcourſe of ſuch offences and actions as by the conſtitutions and ſtatutes of the realm are here examinable. And therein I ſhall omit to ſpeak of force and fraud, and thoſe which I have particularly mentioned already, and ſingle out ſuch other offences as I find ſpecial conſtitutions and ſtatutes for.

AND the firſt is, ſlanders of noble and honourable perſonages, judges, and prelates, who by the ſtatute of Weſtminſter 1. c. 35. and of 2. *R.* 2. c. 5. are to be impriſoned till they find their author; but by the ſtat. 2. *R.* 2. made at Canterbury, c. 11. they are to be puniſhed by the advice of the council. The ſtat. Weſtminſter 2. appointeth, that one refuſing to replevy cattle, as one refuſing the king's juſtice, *puniatur per redemptionem*; and ſo were the defendants at the ſuit of *ſir Robert Mounſon.* The ſtatute 27. *E.* 3. c. 18. giveth power to this court to inflict damages upon them who ſhall here make a falſe complaint, to the ranſom of the party; but this is who hath no *juſtam cauſam litigandi.* The ſtat. 5. *R.* 2. c. 2. forbiddeth any man to paſs beyond the ſeas without the king's licenſe; and the *earl of Arundel* attempting the ſame was puniſhed not long ſince for it.

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THE 16. *R.* 2. c. 2. limits the ſuit in *præmunire* in this court, as is before alledged. All wrongs and injuries to the diſturbance of merchant-ſtrangers which come into this kingdom by the king's ſafe-conduct, were appointed there to be fined by the ſtat. 27. *E.* 3. c. 1. B.; and ſtat. 13. *R.* 2. c. 2. appointeth, that if a queſtion ariſe between the conſtable of England and the marſhal of England who ſhould have cognizance of a cauſe, this court ought to determine it: a great prerogative, to determine the difference between thoſe high courts. And I know no reaſon but as properly the cognizance betwixt the chancery and the court of wards, or either of them, and the king's bench or court of requeſts, might be here determined; but this is an argument only *à ſimili*. Yet let me obſerve, that this act of parliament giveth this court civil juriſdiction in the great and high point of judicature. I find in Fitzherbert, *Nat. Brev.* in the Writ of Protection, that king *Edward* 1. having protected his clergymen and their goods againſt his own miniſters, did appoint, that if they were diſturbed, the miniſters which diſturbed them ſhould be brought to anſwer it before the king's council; for which purpoſe there is a ſpecial writ in the Regiſter. And I well remember certain purveyors for timber, not long ſince, ſentenced for making over-bold with the timber of the lord biſhop of London at Fulham.

THE ſtat. 24. *H.* 8. c. 13. forbade wearing of ſilk in apparel, and directed every man's apparel in his degree. In *Hil.* 2. *Eliz.* many gentlemen were ſentenced in this court for breach of that law; and amongſt others, *Lancelot Vaughan*, *William Puther*, *Francis Mudſon*, *Thomas Green*, *et al.* The ſtat. 33. *H.* 8. c. 1. appointeth, that if any man ſhall by any counterfeited and falſe letters, meſſages, or tokens, get any money or goods from any man, he ſhall be brought into this court and puniſhed; and ſo were *Ferris* and *Baldwin*, *ad ſectam reginæ Elizabethæ*, and moſt ſeverely puniſhed. The ſtat. 7. *E.* 6. c. 6.

forbids

forbids the felling of wines by retail but only by fuch as are licenfed; and one that had a license, by colour thereof countenanced another to fell wine by retail: in *M.* 4. *Eliz.* he was feverely punifhed for eluding that act of parliament. The taking away a maid within years by the ftat. 13. *E.* 4. c. 13. was to be punifhed by a year's, imprifonment and fine at the king's pleafure, which was to be fet in the king's court; but the ftat. 4. & 5. *Philip & Mary*, c. 8. increafed the punifhment to five years imprifonment, although the fault were lefs, being by perfuafion. And fo was the fentence in *Dawes*'s Cafe, and in *Brookes*'s, and many others. By the ftat. of 5. *Eliz.* all men were forbidden to ufe any other divine fervice than what was thereby appointed; and in the 3. *Eliz.* the *lord Haftings* and *fir Thomas Wharton* were here brought to the bar for hearing mafs, yet all punifhment remitted, and they received to the queen's mercy. The ftat. 5. *Eliz.* c. 21. for hunting deer in inclofed grounds, and the ftat. 3. *Jac.* for deftroying of game, are ufually put in execution in this court, and the offender punifhed with grievous feverity, whether difguifed or not. Yet it hath been much queftioned, whether by reafon of the ftat. 1. *H.* 7. c. 7. which maketh it felony after their denial upon examination, they fhould be again examined in this court; and held that they may.

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§. XV. OF THE SUPERLATIVE POWER OF THIS COURT.

HAVING now fhewed what jurifdiction feemeth to come to this court *de incremento* by thefe acts of parliament, although in truth the court in moft of thefe cafes had the fame power before; I fhall now add, fhortly, a few words to manifeft the fuperlative power of this court, not only to take caufes from other courts and punifh them here,

 but

PART II. but alſo to puniſh offences ſecondarily, when other courts have puniſhed them.

For the firſt I find a notable precedent in *Trin.* 1. *Eliz.* The court underſtanding of a great riot committed by *Liſter* and his company againſt one *Delaber*, in Herefordſhire, within the marches, and the matter being there examined before that council, *certiorari* was awarded to the council there to certify the examinations of the witneſſes to this court, not leaving the cauſe to be by them puniſhed, but puniſhed it themſelves. And although ſometimes, if the firſt complaint be there exhibited, this court (if the cauſe be petty) is contented to remit the ſame, yet in great offences, although the inferior councils have certified their priority, the old lord chancellor hath refuſed to remit it; as he did in *Robinſon*'s Caſe againſt *Metcalf*, knight. And it is true, that in the time of *cardinal Wolſey*, who entertained all ſuits, and of all kinds, when the court was overlayed he ſent, at a clap, all cauſes ariſing within the marches to thoſe courts; all within the *duke of Richmond*'s limits he remitted to his council; and to the lady princeſs, to her; ſome, to the duchy; ſome, to his commiſſioners of *oyer* and *terminer*; and thoſe within the county palatine of Cheſter, to the marches of Wales. But that was not becauſe this court had no juriſdiction, no more than if ſhe ſhould remit a forgery to be tried by an iſſue at the common law, which it often doth, and after reſumes the ſentence to this court.

In 4. & 5. *Philip & Mary*, betwixt *Aſtmore* and *Midelmore*, who lived within the precinct of the marches, there were ſuits for riots and for perjury. The riots were remitted to the marches, but the perjury ordered to be here examined; and yet, at that time, by that commiſſion, they had power to puniſh perjury. A few of theſe favours done to theſe commiſſioners by the ſtern guider of this court maketh them play at check with this high ſtate of juſtice; and if they ſhall receive a little

more

more countenance, they will quickly give a mate. It is needful therefore that there be much care taken of the increase of the precedents, unless they continue full of caution of the power of this court, and that the court be pleased to remit it. For so the *lord Egerton* would often do; but he never put any from hearing because they were within the jurisdiction of the marches.

But for the punishing of offences which other courts may punish, the precedents are infinite of all kinds. For misdemeanors committed in any court, the judges of that court may punish it: so may the court of Star Chamber also; as in the unlawful alteration of pleading in the common pleas in *Hussey* and *Bradley*'s Case; razing of finable writs to save the fine, in *Tisdall*'s Case, and long before in *Starling*'s Case; all extortions in all courts; bribery, and corruption of officers: and not only misdemeanors in cases, but the very cases themselves; as an idiot may be enquired of by the country, and examined by the council of the court of wards; and so may the king's council examine him, and determine it. For if this court allow him to have discretion, it avoideth all other inquisitions and examinations, as it is in Fitzherbert's *Nat. Brev.* 44. in the writ *de idiotâ examinandâ*. And so in 8. *H.* 8.'s time, the cardinal chancellor commanded one *Trednock* newly to appell one *Dowmond*, supposed to be an ideot, and then examining him adjudged him to be no ideot. In like manner in ravishing the king's ward, the court of wards (and before the erection thereof, the chancery) had power to punish it. Yea, *sir Robert Constable*, in 16. *H.* 8. for taking away one *Agnes Brisacres*, the king's ward, without license, and affiancing her to his son, submitted himself on his knees upon the quadrangle of the table in this court. So also for taking away the king's widow, *sir Randal Brereton* in 8. *H.* 8. having countenanced the same for one *Richard Brereton*, at this bar made his submission, and begged for mercy. In a word, there is no offence pu-

 nishable

PART II. nifhable by any law, but if the court find it to grow in the Commonwealth, this court may lawfully punifh it, except only where life is queftioned.

I COME to the laft, which is manifeft, that although courts do punifh offences or mifdemeanors, it is no *fuperfedeas* for this court; but this court will punifh it notwithftanding, if they fee caufe.

IN *Mich.* 4. *Eliz.* in the Cafe betwixt *Berry* v. *Bagnall*, although the matter were heard in the king's bench, and the defendant there fined and committed, yet was the caufe here ordered to be profecuted againft the fame defendant. And in the cafe beforementioned of *fir John Conway* againft *Lodowick Grevill*, the defendant was firft fined before the juftices of peace in Middlefex, and yet afterwards fentenced in this court, it being but for a mere affault. And fo alfo fines fet by any juftices of peace for any riot or force, are no obftacle to the high power of this court, but in their difcretion they may either fine it, or add fome exemplary punifhment unto it.

ABOUT 4. *Jac.* one *Sherwood* preferred a bill in this court againft *Frances Blafhfield* and others; and it was for poifoning his horfe, coming into the town to be a fuitor to her daughter. The plaintiff firft complained at the council of the marches, and the caufe was there heard, and fentenced, and the party recompenfed for his lofs; yet afterwards the plaintiff exhibited a bill in this court; and the caufe, notwithftanding his pleading, was here heard, and the defendant again fecondly fined and punifhed. In *Dunckley*'s Cafe, often mentioned, which was for razing of a writ of *capias utlagatum* wherein was *John Hofkins*, and making it *James*, whereby the goods of *James Hofkins* were taken to a good value, and he carried to gaol; in this cafe the matter was examined in the court of common pleas, whence the writ iffued, and to which court the abufe was offered; and, upon examination, the judges committed the actor of it, and fined him: and yet a bill being

ing exhibited in this court, he was most heavily sentenced in 19. *Jac.*

AND to all this discourse I must add one word, which is above all: A suit here cannot die; for if the party die, the king's attorney may proceed for the king; so may he if the party agree; nay, although the cause be dismissed at the suit of the party, as in *Sherfield's* Case; *Trin.* 5. *Philip & Mary*, and many more of later times. But therein there must be this caution, That it be prosecuted before a general pardon; for otherwise it standeth absolutely dismissed, as it was adjudged in the Case of *Cooke* against *Thomas*, 13. *Jac.*

§. XVI. OF THE PRIVILEGES OF THIS COURT.

HAVING now gone through my prefixed heads of the causes handled in this court, I shall now briefly enter into one short consideration of *the privileges of this court*, which if the principal judge should not carefully and severely maintain, it would detract much from the dignity thereof.

THE privilege of the court principally consisteth of these points: That if any man exhibit a suit in this court, and coming to follow his cause or attend his attorney be arrested, the court will send a writ of *habeas corpus*, directed to the keeper of the prison in whose custody he remaineth, to bring his body to this court; and upon the bringing in of the body he shall be delivered, and the action against him discharged.

So likewise if any man be sued in this court, so that his personal attendance be required, if he shall be arrested he shall have the like writ of privilege, stretching in the substance no further than any other court at Westminster; that is, that if he be arrested *eundo, morando, aut redeundo:* but in the circumstance it stretcheth much further; for in this court the action is absolutely discharged, whereas in

 the other courts the suit is only removed. But that cannot be (as it is supposed) in this court, for that there cannot be a legal trial of any personal contract or trespass, the cause not being from thence sent to trial, as out of the chancery, which surely may be done with as much equity.

AGAIN: In this court, if any party in court shall arrest any who hath a suit, he that causeth that arrest shall be committed to the Fleet for his contemptuous breach of the privilege of this court in arresting him, who in his knowledge is tied to give his attendance upon the court; yea, although the party arrested be a person disabled to commence a suit; of which there was a notable precedent in the time of the lord chancellor *Egerton*. ---One *Ellis* put in a bill against *sir William Hall*, and served him with process to appear in the Star Chamber. After the process served, *sir William Hall* arrested *Ellis* at his suit at the common law. *Sir William Hall* appeared in this court to *Ellis*'s bill, and pleaded in bar an outlawry; that *Ellis* before and after the time of the process served, and appearance made, was outlawed, and so disabled to sue. After this plea put in, *Ellis* required his privilege upon the arrest, and moved to have *sir William Hall* committed for breach of the privilege of the court; whereupon it was alledged to the lord chancellor, that he was a disabled person, and could neither sue nor have privilege, for that at the time of the arrest no disability was pleaded of record, and without the pleading he was not disabled in this court; and yet by reason of the newness of this case, his lordship spared *sir William Hall*'s commitment, and only ordered him to pay the warden of the Fleet's fee.

BUT some question hath been, Whether a stranger, not party to the suit, shall have privilege? (And first, for witnesses, it is clear that they shall; and in 39. *Eliz.* one *Vaughan*, who was relator to the then queen's attorney in this court against one *Shervile*, *Jefferies*, and others; *Shervile* arrested *Vaughan* in London, who crav-

ing

ing his privilege had the ſame granted unto him, and made returnable *mediatè*, and was diſcharged in the afternoon at the lord keeper's houſe.

ANOTHER queſtion hath been ſtirred, Whether after a defendant is admitted to his attorney, whereby he is diſcharged of perſonal appearance, and the proceſs to remain afterwards ſerved upon him are but warning to give him notice, and do not require his perſonal attendance; if upon ſuch attendance he be arreſted, he ſhall have privilege? which the ſame lord in the caſe of one *Ezechiel Croſs* thought reaſonable; affirming, that he being then to examine his witneſſes, no man could ſo well give inſtruction to counſel to draw his articles as himſelf. But one great ſtrictneſs is required in the allowing of the privilege of this court: That whereas in other courts the writs of privilege go forth upon bare ſuggeſtions, they never are awarded here but upon oath that the party arreſted was going to, attending, or returning from, the court; in which caſes, if the party deſire only to diſcharge himſelf, the *lord keeper Egerton* gave a general power to the clerk of the court to award the writ of privilege of courſe; but if the puniſhed be preſſed for the contempt, then muſt the prince, judge, or court, be moved. But now of late the judges of the king's bench have refuſed to give allowance to the writ which hath been antiently allowed to the plaintiff which here followeth his cauſe, for that the words are *pendente placito in eâdem curiâ*; making the interpretation thereof to be, that then no man ſhould be ſued in any other court, whilſt he had any ſuit here depending; whereas the meaning of the writ is, that his privilege is to be allowed unto him at any time hanging the ſuit. And what is that privilege? *Eundo, morando, redeundo*; and that not upon every ſuggeſtion, as it is in the court of common pleas or king's bench, but it muſt appear to be true upon oath, or elſe the writ is not awarded: yet upon that ſudden exception, without argument or judgment, the clerk of the proceſs

hath

PART II. hath altered his antient form of his writ, which may be prejudicial in future times.

I HAVE already heretofore touched the privileges of the officers of the court, who being the lord chancellor's clerks may furely be as properly privileged by him as his menial fervants; and if his lordfhip fhall once direct one man to appear before him in the chancery, and there let the current of his juftice run, it would furely free all future clamours of all forts.

ANOTHER privilege this court hath, that if any offenders be here punifhed for animating, abetting, or procuring the offence, by the courfe of this court the procuror fhall not only bring in him whom he did procure to anfwer, but he fhall alfo, if it pleafe the court, pay his fine for him; and fo was it in *fir Rowland Stanley's* Cafe, in *fir Richard Manfell's*, and in all the great Cafes of antient times.

A THIRD privilege this court hath, although the offences be here criminal, yet the hufband, although he be a ftranger to the offence in this court, he fhall pay his wife's condemnation; and fo was *fir Henry Townfend* compelled to do for his lady, in *fir Richard Egerton's* Cafe, after long debate and view of divers precedents in the point, and amongft others *Seymour's* Cafe, 2. *Eliz.* 7.; and that was one of the greateft queftions which was then determined upon fuch great deliberation of the judges.

§ XVII. OF CONTEMPTS.

IF I fhould not fhew in what cafes and forts this court doth punifh affronts and contempts, I fhould omit the chiefeft means of upholding the jurifdiction of this court. The original procefs being but a motion, and no attachment in many cafes, if it fhould not be countenanced, and the

the ſcorn thereof ſeverely puniſhed, it would in ſhort time be brought to utter contempt and neglect; and therefore, if a miniſter ſhall be reviled in the ſerving of the proceſs in this court, or the writ ſcorned or rejected, upon affidavit made thereof, the party offending ſhall be committed; or if the defendant ſhall offer to ſmite or ſtrike him. So I find in 2. *H.* 8. one *Cheeſman* was committed for drawing his ſword upon him which ſerved proceſs upon him in the church of Eſterford, in Eſſex. But if a ſtranger ſtanding by commit the contempt, he is firſt called by proceſs before he is committed: ſo was one *Benwell* in 1. *H.* 8. for keeping one *Clerk* (who ſerved a proceſs upon one *Trentham*) and making him drunk whether he would or not. Neither ſhall the defendant be allowed in this court the means to acquit himſelf by his execution, as in the chancery, except in ſome caſe the worth and reputation of the party charged, or the vileneſs of the accuſer, bring the court to ſuſpect the truth of the oath. And if the outrage committed be heinous, the court will cauſe an information to be put in for the ſame; as in the Caſe of *Hill* againſt *Norton*, the defendant compelled him that ſerved him with the proceſs to eat it. And it is not only in ſerving of the *ſubpœna*, but of all other the proceſs of the court. As not long ſince an extent went out of this court on the behalf of one *Popham* againſt *Harvey*; and the jury being laboured, could find no goods of *Harvey*'s but an old barrel and a turkey-cock. And for this ſcorn the court ordered his majeſty's attorney-general to put in an information againſt the jury. And in like manner it is, if a witneſs attending or being examined in this court, ſhall be threatened or ill uſed, or any commiſſioners evilly entreated, the court will puniſh this as contempt againſt the court. As in the 4. *Eliz.* the *lord viſcount Binden* calling one *Harding*, who was examined againſt him, "*knave*," he was fined in 100l. for that abuſe. And as parties, commiſſioners,

PART II. missioners, and witnesses, must behave themselves civilly, and with due reverence in executing all things by authority of this court, so must likewise the pleading be discreet and the questions asked. For if they shall endeavour to rip up the lives one of another impertinently to the case in question, they shall be punished, as I have formerly declared in the First Part.

But if after sentence any man shall derogate from the same, this court hath severely vindicated the same. In 3. *Eliz. sir Rowland Stanley* having been severely sentenced in this court, went down afterwards into Cheshire, and there reported, that he was not sentenced or committed by any that had authority to commit him; and for these words the then attorney was ordered to prefer a new information against him. And as in an abuse of words, so in an action, if any man shall disobey the same, he shall be committed, close imprisoned, and fined for contempt; nay, fed with bread and water, as *Markham* was until he did submit himself. But if it be alledged that there is no ability to perform it, if the plaintiff can make proof of any fraud in conveying away the goods to defeat the plaintiff of the benefit of the decree, the court will give an assistance by commission, testimony, or new bill, to manifest or discover it. So in the Case of one *Crouch* in 4. *Eliz.* the attorney-general was appointed to examine him concerning the sale of his goods, whereby the sentence of this court was defrauded, and yet the plaintiff had a commission to make proof thereof; and that appearing, he was punished: which course was begun against *sir Thomas Brereton*; but the case then received a composition. It is not possible to recapitulate what words or what actions make a contempt, but those are left merely to the discretion of the grave and judicious moderator of this great and honourable presence.

FINIS PARTIS SECUNDÆ.

PART

PART THE THIRD.

Of the Course *of the* Court *of* Star Chamber.

§. I. OF THE CONVENIENCY OF THE OBSERVATION OF COURSE.

BEING in the laſt place to treat of the courſe of this high court, it is fit, before I make particular relation of the form of all the proceedings, I ſhould in general ſhew, that it is convenient, both for judge and ſuitor, that a certain courſe and form of proceeding ſhould be followed in all caſes, and not every thing ordered *ad libitum judicis* in every caſe. And the reaſon thereof is, firſt, for the judge, to whom it would be very troubleſome to give a ſeveral direction to every cauſe, how it ought to proceed to hearing; which ſurely at the firſt the judge did, until the continual uſage, by the direction of wiſe men, in proceſs of time bred a rule, which was found to ſtand conveniently with juſtice for the court and the ſubject. The ſecond benefit of the obſervation of courſe, is the benefit of the ſuitor and his counſel, who by reaſon of the ſtability of form is able to give advice in what paths the ſuitor may ſafely tread without danger to his cauſe, or peril to his perſon. The third reaſon is, for that this courſe of court by long cuſtom hath obtained the force of a law; and although the book 5. *E.* 4. fol. 122. be, that precedents do not rule law but law rules precedents, yet *Plowden* in the *Caſe of the Mines* agreeth, that the courſe of the court is the law of the court, yea, the law of the whole kingdom for matters examinable in that court. And *ſir Edward Coke* in his Second Reports in *Lane*'s Caſe affirms, that the common law takes notice of the courſe of every court of the king as of an univerſal law. And if of all other courts, then of this

PART III. this especially, it having been settled by the consent of so many noble, learned, and grave judges in all laws, and not any thing repugnant to the common law of the kingdom.

And this great benefit redoundeth to the judge in following course, that whatsoever mischief shall fall out in a particular cause, his following of universal form is an excuse against the most violent detractors. Yet let this be understood, that if it shall appear that the general course of the court will be mischievous in some one case, either for the king or the subject, the court hath power to alter the usual form in that particular case; for otherwise, by the subtlety of men's inventions, common course would overthrow good order: but this must be done upon weighty considerations, and in open court.

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§. II. OF THE PROCEEDING BY ORE TENUS.

And since I am to set down what the form is for the prosecuting of a suit in this court, I must begin with the inception of every suit; which is, either by some particular person's complaint, or by the curious eye of the state and king's council prying into the inconveniencies and mischiefs which abound in the Commonwealth. And these have, for the most part, several kinds of proceedings. Particular persons' complaints are, either parties grieved, or informers: informers are, again, either in their own name, or relators to the king's attorney-general; but that, in some cases, the king's attorney-general hath some privilege, and those have an ordinary course of proceeding; who are all the sorts of plaintiffs in this court, except the king's almoner only. But the suits which arise upon the animadversion of the state of some growing mischief, which is like to prove dangerous if it be not nipped in the

the bud, that for the moſt part hath an extraordinary kind of proceeding, more ſhort and more expeditious, which is called *ore tenus*; which courſe of proceeding, howſoever much blamed, as ſeeming to oppoſe the Great Charter, and other acts of parliament, whereof I have ſpoken in the Firſt Part of this Treatiſe, by reaſon there is no judicial proceeding nor complaint exhibited whereunto the party charged to be an offender hath ſpace given him to anſwer, or liberty to adviſe with counſel, in reſpect of frequency would be wiſhed to be forborn; yet in caſe of neceſſity the lawful uſe of this courſe of proceeding would appear as fair to the eye of juſtice as any other whatſoever.

For when ſome dangerous perſons attempt ſome unuſual, and perhaps deſperate inventions, which, in ſhort time, may be very like, to endanger the very fabric of the government, theſe perſons are apprehended by a purſuivant or meſſenger, and privately examined, without oath, or any compulſory means, concerning the fact. If he ſhall deny the accuſation, then cannot the court proceed againſt him *ore tenus*; but if he confeſs the offence freely and voluntarily, without conſtraint, then may he be brought to the bar; at which time his confeſſion is ſhewed him; and if he acknowledge it, then who can doubt but that the court may juſtly proceed *ex ore ſuo*, and give a judgment againſt him: *ſed cum confitente reo citiùs eſt agendum*; but if he then deny it, although it be ſubſcribed with his hand, and in the preſence of the king's council, which are preſent to teſtify the ſame, yet is the rule ſo ſtrictly held, that they muſt proceed upon confeſſion; and *Pye* ſo denying his confeſſion was remitted from the bar, and the court afterwards proceeded againſt him in a formal manner by witneſſes.

And it may be obſerved, that I ſay that the proceeding by *ore tenus* muſt be done only upon confeſſion; for, therein ſometimes there is a dangerous exceſs. For whereas the delinquent confeſſeth the offence *ſuo modo*, the ſame is ſtrained

PART III.

ſtrained againſt him to his great diſadvantage. Sometimes many circumſtances are preſſed and urged to aggravate the matters which are not confeſſed by the delinquent; which ſurely ought not to be urged, but what he did freely confeſs in the ſame manner. And happy were it if theſe might be reſtrained within their limits, for that this courſe of proceeding is an exuberancy of prerogative, and therefore great reaſon to keep it within the circumference of its own orb. And ſurely if this juſt courſe were duly obſerved, I think none that would be content that offences ſhould be puniſhed, will find fault with this kind of proſecution. For, firſt, no proof can be urged but what cometh out of his own mouth; and to extenuate that offence, and mitigate that cenſure, he is and ought to be heard ſpeak for himſelf; but himſelf muſt only ſpeak for himſelf, his counſel may not. Thus equal juſtice being conſtant in this court, that as no man accuſeth him but himſelf, ſo may no man excuſe but himſelf. his tongue being like *Peleus' haſta, ut ſola nocet poterit ſic ſola mederi.*

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§. III. WHO MAY EXHIBIT SUITS IN THIS COURT.

I COME now to the ordinary proſecution of cauſes upon the complaint of particular perſons; wherein there ariſeth, firſt, to be conſidered, what perſons may exhibit a ſuit and make complaint in this court, and what not. And for that, it is firſt undoubted that an alien may exhibit a ſuit in this court; for it ſeemeth to be the proper court for merchant ſtrangers which are robbed of their goods to complain. And ſo *R.* 3. ſat to hear the cauſe of the Spaniſh merchant upon the ſtat. 27. *H.* 3. c. 13. And of latter times *Guerrin,* a Frenchman, proſecuted a ſuit

a suit against *sir Richard Hawkins*, for unlawful favour shewed by his connivance, who suffered the pirates who robbed *Guerrin* to escape; which bill came to hearing: but the stranger being ill advised in the framing thereof, it took no effect. And in that suit the worthy chancellor took this indifferent order to compel the Frenchman to secure the payment of the defendant's costs, which he did by depositing 100l. in court; a necessary course to be followed; for otherwise when they have vexed the subject, they may leave the kingdom at their pleasure, and the defendant remain remediless for his great expences. So likewise, if an infant within age shall complain by his guardian, or *prochein amy*, the guardian shall be answerable for the costs; but if the suit shall continue till the infant come to full age, and then the infant prosecute it, he doth then become liable for the whole from the beginning of the suit.

A MAN entered into religion might heretofore have prosecuted a cause in this court; and the reason is, for that the suit is for the king; in which case, at the common law, a religious person might sue to enable himself to pay the king; for divers suits were of that nature in the times of *H.* 7. and *H.* 8.

To be short: no sort or condition of people, from the king to the beggar, but in their particular capacities may sue in this court; for so many of the most indigent people have done in times past, and severe punishments have been inflicted upon most eminent men for wrong done to those that were most miserably poor; as against justices of the peace for whipping of those which were not to be whipped by the law.

BUT especially cautions are to be used in poor men's suits. The first is, that care be taken that no man be admitted to sue *in formâ pauperis* unless he bring a testimony of credit that he hath just cause to complain; otherwise the court will be filled with clamours and vexatious

ſuits of poor people living in remote parts. The ſecond is, if two men join in a ſuit, the one able and the other poor, the able man may not ſue under colour of the poor man's poverty, and ſave his purſe. The third and laſt is, that if thoſe of the poorer ſort, although not *in formâ pauperis*, have ſuits, which, on preſumption, are clamorous by reaſon their perſons are infamous, or that the matter hath received many trials againſt them, then they may be bound with ſurety to pay coſts, if they prove not the bill: but otherwiſe, great care is to be taken that every man be not bound with ſureties to pay coſts. For ſo, if a great man in the country oppreſs a poor man, no man dareth be bound for the poor man for fear of the diſpleaſure of the rich, and ſo the poor ſhall be without remedy, of whom the court in former times hath taken the greateſt care. And thus much of ſeveral diſtinct perſons who may ſue in this court.

But it hath been heretofore much queſtioned, Whether ſeveral men might join together in one ſuit for ſeveral matters? And ſome judges have certified, that they could not in this court more than at the common law; and the reaſon they yielded was, for that one man might by that means maintain another man's ſuit. But aſſuredly it is no good reaſon, for that every ſuit in this court is the king's ſuit, and it is lawful for any man to maintain the king's ſuit; and it is fit that a grieved perſon join another with him in his complaint, for fear of death, outlawry, or other diſability, and they jointly proſecute the cauſe; which they may both do, as well as any ſtranger may inform. And that every man may inform for the king in this court, there is no queſtion, except in ſome cauſes, where diſcretion ſtayeth the proſecution, leſt the grieved party receive injury inſtead of comfort. As in the caſe of an infamous libel made againſt a man, a ſtranger may not inform without the conſent of the grieved party, for ſo they may bring his reputation in queſtion; whereas perhaps he is contented that his diſgrace

grace should sleep, some men being willing to wear their horns in their pockets, rather than upon their heads. Again, if a great judge of this kingdom should be scandalized for corruption, every man may not complain of the scandal; for perhaps it were sometimes better for the public justice of the kingdom that the same sleep, than if it were questioned: but in these cases the party grieved must give his approbation, unless the king's attorney prosecute it. But if any offence be committed, and a stranger will put in an information for the same, and calleth the defendant to answer, and afterwards the party grieved shall exhibit his bill, the information shall not bar his suit, but shall stay; for such information may be put in by collusion, and may be either remissly prosecuted or negligently proved, and so the king loseth his benefit. But if the information had been put in by the king's attorney, *that* would have barred the plaintiff's proper suit, for that it is intended he will take care of the king's profit, and the Commonwealth's example; and the grieved party upon his suit shall be recompensed, and so there is no inconvenience. Again, if one disabled person complain, and a plea is put in to the disability of his person, which shall be hereafter shewed, and afterwards a stranger will inform, the second shall proceed, for the danger the king may lose the suit by the disability of the former. But if the first shall set himself *rectus in curiâ*, the informer shall stay.

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THAT a corporation or body politic may sue in this court there is no question; only it hath been questioned, whether the successor should be charged with payment of costs; which was insisted upon in the Case of the wardens and company of weavers of *Newbury*, upon suggestion, that the wardens who begun the suit were factious, and commenced the same out of private malice, and the same was disliked by the company: yet the wise

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PART III. chancellor, conceiving that all corporations might make the like ſuggeſtion, gave the new wardens a day after they were attached to pay the money, or otherwiſe to be committed. Churchwardens may alſo complain in this court, and their ſucceſſors may proſecute, and are chargeable to pay coſts. Huſband and wife may complain for a wrong done unto the wife's eſtate to her diſinheriſon, and if the huſband die, the wife has election to proſecute or not; for if ſhe will ſurceaſe, the defendant can have no coſts; and if ſhe will proſecute, they are to have coſts from her proſecution; but if ſhe recover, ſhe ſhall have coſts for the whole ſuit, for ſhe was party from the firſt in any thing which ſhall be for her advantage; but if her ſuit ſhall be unjuſt, ſhe did wrong but only from the time ſhe was ſole, for the former wrong was the wrong of her huſband, which died with his perſon, as the *lord Egerton* directed in *Walkins'* Caſe.

BUT it were tedious to run through all conditions of perſons that may complain; it will be a ſhorter courſe for me to ſhew, *who may not* be received to *complain* in this court; wherein this will be a conſtant rule, that no man ſhall be received to exhibit a complaint which cannot, by the rule of law, be compelled to pay coſts, except only the king's attorney, or ſome which ſupply his place, and that merely for the king; which moved the *lord chancellor Egerton* to reprove the king's attorney for entertaining private men's ſuits as if they had been merely the king's. And it ſtandeth with the honour and juſtice of the court to be careful as well to recompenſe the grieved innocent which is vexed with *falſe ſuggeſtions* (being a grievance which the court of parliament had of this court three hundred years together) as to puniſh the guilty pecuniarily or corporally; and therefore a *feme covert* cannot ſue in this court, as it hath been often adjudged, and much debated in the Caſe of one *Floyd*, of Southwark, who was vexed with a woman whoſe huſband was gone to the

East

East Indies, and she complained of wrong done after her husband's departure; yet it could not be allowed, because she could not be compelled to pay costs legally. But by collateral means the lord chancellor *Egerton* compelled one *Gwency* v. *Groin*, being a *feme covert*, to pay costs: she had caused divers to expend in appearing at her suit, who were dismissed with costs, for that she being a *feme covert* could not sue, and so was ordered to pay and discharge the costs, or to be whipped; so that *ecce modo mirum quod fœmina per brevem regis* holdeth not in this court. But the husband may complain against the wife; for so did mr. *Fowler*, as may be well remembered.* So a person outlawed, excommunicated, convicted in *præmunire*, or for felony, or for recusancy, cannot sue or prosecute any suit in this court until he reverse his outlawry, have his absolution, be received into the king's protection, or have conformed himself in obedience to the church. But these are more properly to be called *suspensions* of men's suits, until they be reformed, rather than absolute disabilities; and in these cases the court may order, that (notwithstanding the disabilities) the plaintiff shall be answered: for so did the last lord chancellor by *sir Francis Raysche* to answer a bill of *sir Ralph Bingley*, being a person outlawed. But I suppose it was hard and illegal, and not to be done, unless that the outlawry or conviction of the plaintiff were gained by the defendant's means, on purpose to disable him. In like manner to these last named is it if a person which standeth forth all process of contempt in this court shall exhibit a bill against another, such a bill shall not be answered; for *frustra legis auxilium implorat, qui in legem committit.* And I suppose that a person convicted for a conspiracy, who hath had the villainous judgment, whereby he hath lost the benefit of law, cannot prosecute a suit here; and I doubt of it, if he were convicted by the sentence of this court.

§. IV. OF THE KING'S ATTORNEY'S SUITS.

Vide sir James Burrow's Reports, vol. 4. p. 2554. Lord Mansfield quotes this passage relative to the attorney-general.

I HAVE handled the particular persons which exhibit suits in this court. It remaineth that I should, in the next place, treat of the king's ordinary suits, which are of two sorts; either by his attorney informing of himself, or by other men's relations; and by the king's almoner; the one being in criminal causes, the other in civil.

FOR the king's attorney, I have known it much questioned, whether any other of the king's counsel may not inform for the king, as well as his attorney-general; and it is true, that in Easter Term, 8. *H.* 8. it is ordered, that the king's solicitor shall not prosecute any further the merchants of the Steel-yard, till it was otherwise ordered by the council; and in the same Term the solicitor was commanded to sue out process against some which acquitted one *Blase* of a rape: so that it seemeth, that others of the king's counsel did prosecute causes for the king, as well as the king's attorney. But in 1. & 2. *Jac.* it was resolved by the court, that it belonged to the place of the attorney; and *serjeant Hale*, the king's serjeant, putting in a bill against *sir John Luson* was denied that privilege; for if a bill be put in by the king's counsel as for the king, there are no costs to be paid to the defendant, no fees for the prosecution; but in this case *serjeant Hale*'s bill was dismissed with 30l. costs; it continuing in prosecution not above two Terms.

BUT because the king's causes are of great weight and labour to the clerks, and in all other causes that the defendants pay the plaintiff his costs, the *lord keeper Egerton*, *Hil.* 44. *Eliz.* made an order in the case where the king's attorney was plaintiff against *Harwood* and *Tookey*, that the defendants, who were sentenced at the king's suit, should always pay costs to satisfy the clerks which were for the king

king all their duties and fees; a fit order to be continued, but the ſame hath not been of late uſed. For in the great *Dutch* Caſe the king diſtributed a great ſum of money amongſt the clerks in recompence of their care, fees, and travail.[•] But if defendants be acquitted, they can have no coſts in ordinary courſe; but if it appear the king's attorney proſecuted the cauſe by another man's relation, the lords will and may tax coſts to the defendants, which are diſmiſſed upon apparent manifeſtation that the ſame was by a certain perſon proſecuted, and that he laid out any money in it. For in 1. *H.* 8. the lord mayor of London was compelled to pay the coſts of ſome Kentiſhmen, againſt whom he had given intimation to the king's council for engroſſing of corn. And ſo did the *lord Egerton* againſt *ſir John Spencer* of London, although *ſir Edward Coke* oppoſed it with all his power, and their coſts were paid.

But if there be a relator entered upon record, he ſhall pay all coſts, yea and damages, as another man; but no man ought to have coſts, unleſs he be a relator upon record; for ſurely the *lord Houghton* ought not to have paid coſts to *ſir Edward Coke* before he was entered relator, only he may have damages.

If the king's attorney inform for an outrage, or ſome particular man be found to be much wronged, the court may give him damages, although he be no party in court; as it was adjudged in the *clerk of the market*'s Caſe, who was ordered to make reſtitution to all thoſe from whom he had extorted.

And ſuch as relate ſuits to the king's attorney have this advantage, that they are not tied to any ſtrict rule of proſecution, but only to the order which the court ſhall make, or the lord keeper. A great queſtion hath been ſtirred, Whether the king's attorney may proſecute a cauſe *virtute officii*, although the court diſmiſs it? and ſuch an one was not long ſince proſecuted by the relation of one *Vaughan* againſt *Sherwell*. But ſurely the de-

 fendants

PART III. fendants were thereby wronged, and the court something dishonoured. For by the case before cited, *Port*, solicitor to *H.* 8. was ordered to surcease the suit against the merchants of the Steel-yard; and there is no reason but he being a party should be ordered by the judges, and concluded by their order, as well in point of prosecution as in the judgment, or final judgment.

BUT though it be a positive rule, that any man may inform for the king in the Star Chamber, yet in some cases a private person shall not prosecute, but the king's attorney. As about 13. *Jac.* a private person put in an information against some merchants in London who had the charge of the lottery for *Virginia*, upon the discovery of a notorious deceit in purloining all the great lots: although this was held a marvellous great deceit to the public, yet it was not thought fit that a private person should inform for this, it being a matter of state, which might trench to the overthrow of that plantation. And so if scandals be of the public justice, every man may not inform for it, for that it may sometimes be made more prejudicial to the state by the scandal, than the example will do good, as it was adjudged in *mr. Strewde*'s Case. But surely it was a great inconvenience, when the king's attorney denied any men to inform for the king, and informed them to repair to himself; which if it should have allowance, would be a means to smother many offences in the kingdom, which by others' information (though out of malice) come to light. For the king's attorney's prosecution is but sudden, *flagrante crimine*; as in the time of dearth, to punish a few ingrossers of corn; in time of levellers rising, to punish a few inclosers of commons; but the great offence wearing old, then it is either forgotten, or by intercession closed up, that it venteth no more in the public: for the example in few giveth satisfaction to the multitude, and the end of that punishment is held to be, *ut pœna ad paucos metus ad omnes*.

BUT

But let me be underſtood when I ſay, that the king's attorney is not tied to the ſtrict rules of proſecution; for that is only to ſtrictneſs of time, for ſaving men's diſmiſſion; for he muſt make a good bill, in matter and form, as a common perſon; he muſt join iſſue, give convenient time for examination of witneſſes, as a common perſon (the denial and reſtraint whereof was no ſmall ſcandal to the juſtice of the kingdom in the *Dutch* Caſe); he muſt give warning for the hearing; and make as pregnant, manifeſt, and direct proof, as any common perſon whatſoever.

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§. V. OF THE SUIT OF THE KING'S ALMONER.

There is another kind of ſuit for the king, which is for the king's alms by his almoner, which is properly examinable in this court; and that is, where any goods of a *felo de ſe* or deodands are withheld from the almoner, which ought to come to him for maintenance of the king's alms, he may ſue the perſons which he doth ſuſpect in the Star Chamber, if it be but for the value of twelve-pence. And it was a very neceſſary courſe, for that commonly thoſe perſons which prove *felons de ſe* are of retired conditions, and their eſtates reſt in men's hands in ſecret; ſo that if there be not a ſtrict means to ſift the ſame out, when he is dead, it will hardly be diſcovered: and therefore the examination upon oath which is in this court, is very neceſſary to help the king to his right. And in the recovery hereof, the king's almoner doth proſecute without charge, as the king's attorney doth in all cauſes for the king, paying no fees to any officer. But the almoner hath ever uſed to pay to every officer half the fees; as, to the attorney, twenty-pence for his fee, and ſix-pence for the copy of every ſheet, whereof three-pence goeth to

the

PART III. the clerk of the court, and the other three-pence the attorney retaineth to himself; and so in the like fees.

Concerning the *matter* of this suit, I have spoken before in the Second Part of this Treatise; and for the *end* of the suit, the same is not necessary to be punished by fine and imprisonment, as in all other cases, but to cause the party to render to the king's almoner that which is withholden: only if he shall not perform the order of the court, he shall be committed for his contempt; and the defendant shall likewise pay the king's almoner all his costs, to be taxed by the lord keeper, as in the cases of other persons. And if he shall unjustly vex any man, he shall not pay costs, unless it be by the special order of the court, for that he hath liberty to make inquisition to find out the king's right, for the maintenance of his alms. And the king's almoner hath the same prerogative that the king's attorney hath in filing his bill, and prosecuting his cause, at his will and pleasure, without the strict restraint of the rules of the court, whereby all other suitors are straitened.

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§. VI. WHO MAY BE SUED IN THIS COURT.

Having shewed what persons may sue, and who may not sue, in this court; it followeth in order, that I should shew *what persons may be sued* in the same.

And to begin with the highest, it seemeth the king himself, who, as *Bracton* saith, cannot be sued but sued unto by petition, may in this court have a petition of right made unto him, requiring, that right be done unto the party grieved by his lords and great council. For so I find that the great *duke of Buckingham*, whom one Reporter calleth the mirror of all courtesy, in 2 *H.* 8. came to this bar, assisted with his counsel, and desired of the king

king and his council to be reftored to the office of high conftable of England, which was unjuftly taken from him, as he pretended; and received order from the court to put his complaint in writing; and the next day he exhibited his bill, and forthwith the king's learned counfel were ordered by the court to put in an anfwer, and the duke fhortly after ordered to reply thereunto; fo that the king himfelf hath been defendant here as well as plaintiff.

AND in the next place are the earls and peers of this kingdom, who are in this court ufually defendants. So was the *earl of Northumberland* in *H.* 8.'s time ordered to anfwer the bill, and at the bar made an humble confeffion of all things which were alledged againft him, and fubmitted himfelf to the king's mercy, and prayed the court to be fuitors for him, and efpecially the cardinal, the then lord chancellor, and many more of the fame rank and order, both in the reign of queen Elizabeth and our dread fovereign king James.

CORPORATIONS and bodies politic are alfo made defendants in this court; and becaufe the body politic cannot anfwer but by attorney, and fo be made fubject to the judgment (for the body politic cannot be fworn), I find in 2. *H.* 8. a command given to thofe that were of counfel with the mayor and commonalty of Norwich to exhibit their letters of attorney into this court; and nothing was fo ufual in thofe times as fuits betwixt abbots and convents, and the mayor and commonalty of that place near the abbey, as I have fhewed in the Second Part.

AND of later times the mayor and commonalty of London were defendants to a fuit in this court, and made parties thereunto. Aliens and ftrangers may be made defendants in this court; fo were the merchants of the Steelyard and the Hanfe towns in *H.* 8.'s time.

AND in 2. *H.* 8. letters were fent from the king to the lord chancellor, that the court fhould give faith to whatfoever fhould be delivered by the prior of St. John's

of

PART III. of Jerusalem, who delivered the king's pleasure, that the lords should call before them the abbot of the Cistertians, who being a stranger was come into England to visit that Order; who being called, and often heard, was in the end commanded not to visit here. And the fresh prosecution of the merchant strangers for transporting of coin cannot be forgotten.

A *feme covert* shall be defendant in this court, and her husband shall pay costs and damages for her, as it was adjudged in *sir Henry Townsend*'s Case, although much opposed by the judges; for that in civil causes, they said, the husband's estate should be charged by the wife, but not in criminal causes, for he shall not suffer in person for his wife's crime. But surely the case was justly over-ruled against the judges by the labour of that wise lord chancellor, for costs and damages are civil parts of every cause; and if an action were brought against a wife for a battery, and damages given, the husband at the common law shall pay it, for two reasons; the one, for that it was his folly to take such an unruly wife; the other, for that it is the husband's duty to correct her ill manners, as appeareth by the writ *de securitate pacis*, in Fitzherbert's *Nat. Brev.*

The poor people shall be made defendants in this court, for many times they are made instruments to do the greatest offences, but they shall not be admitted to sue *in formâ pauperis*. If there be any able persons joined defendants, upon their oath they ought to be admitted, and have counsel assigned unto them; which is one of the favours usually done by the lord chancellor or lord keeper. All persons disabled by law may, notwithstanding, be made defendants in this court, as well as at the common law, for they cannot plead their own disabilities, except persons attainted of felony or treason: and *Empson*, being a prisoner in the Tower, was enforced to give answer in this court, but not personally called forth for that purpose. And in the end of the reign of queen Elizabeth

Elizabeth a man having a heavy sentence in this court for gagging a woman in Fleet-street, with intention to have robbed her, confessed himself to have committed treason at the bar, to prevent the execution of the sentence of this court; but this sentence was first executed, and he was afterwards indicted, arraigned, and executed for the treason.

But it is usual, that an infant under years of discretion is not charged in this court with an offence; but upon view of his tender years, being brought before the lord chancellor, he is discharged. So likewise an ideot, or a man *non sanæ memoriæ*: and the reason which is yielded is, for that the one hath not discretion to discern the weight of an oath, and the other can yield no reason or answer to the court. But yet methinks the reason is not prevalent, for a body politic cannot be sworn, and yet shall be made party; much more ideots and infants; for the proverb is, "that children and fools will tell true." But the true reason is, for that the court will not be swayed with the testimony of such person to accuse others; and the examples will do little good in the Commonwealth to see a boy punished; for otherwise, by the law, an infant may be a felon, *quia malitia supplet ætatem*, and shall be punished for any contempt or contumacy, so that he be above fourteen years of age; and such an one may well answer for himself in this court. Besides, such persons are usually employed to do unlawful things; and many dissemble madness and folly; and therefore the court ought to be tender how such persons are discharged.

But if an infant be above the age of fourteen years, and be a party in court, he shall be liable to the sentence; for by the common law an infant is bound by every statute law, if he be not expresly excepted. And so young *Wiseman* was sentenced, being a party to whom his father made a fraudulent deed to deceive creditors. And I remember that I, being of his counsel, urged much that his fine should be spared for his infancy, although the deed

were

PART III. were damned: but the lord chancellor anſwered me, that an infant ſhould be puniſhed in rediſſeiſin by fine, and impriſoned; and ſo was *Wiſeman* puniſhed in that caſe. The churchmen are not free from the ſentence of this court; witneſs *mr. Cloſſe*, and before him *Peter Brereton*; both which were ordered to be deprived, and *Cloſſe* was deprived accordingly. Neither are perſons of decrepid age ſpared from anſwering here; but ſome which ſtood in contempt, have been brought up in litters to make anſwer.

So then no decree or eſtate, no ſex, nor age, nor condition, are privileged from making their appearance or anſwer in this court; no, not burgeſſes of the parliament; for ſo I find in 11. *H.* 7. one *Boughley*, being there called a burgeſs of the parliament, made his appearance, and was enjoined to appear *de die in diem*.

THE record is direct, yet I do not diſpute the privilege, for that I have heard that it hath been there determined, that the ſervice of a *ſubpœna* hath been a breach of their privilege; which is ſtrange, for that it reſtraineth not their liberty. Neither is any place in the king's dominion exempt from this ſeat of judgment; neither Portſmen, or Stannarymen, as I have ſhewed in the Second Part of this Treatiſe.

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§. VII. OF THE PROCESS WHEREBY APPEARANCE IS REQUIRED.

THUS having ſhewed who may complain, and againſt whom complaints may be exhibited in this court, it followeth, in the next place, that I ſhould ſhew the means how delinquents ſhould be called into this court to make their appearance, but that there ariſeth a queſtion in the way, Whether any man be called before a bill be filed againſt him *in formâ juris* upon record? for the bill is *origo et caput*

caput sectæ, as it is said in *Littleton*'s Case; and the words of the *subpœna*, as they say, import the bill to be filed before the writ granted; for it is, *quibusdam certis de causis coram nobis et concilio nostro expositis*; which is matter contained in the bill; and therefore the *lord keeper Egerton*, in his settled orders, made for the direction of the court, did enjoin bills to be filed before any process were awarded; which he did upon certain information, that many solicitors who lived in Wales, Cornwall, or the farthest parts of the North, did make a trade to sue forth a multitude of *subpœnas* to vex their neighbours; who, rather than they would travel to London, would give them any composition, although there were no cause or colour of complaint against them: which strict rule breeding a great inconvenience, for the haste in putting in the bills, made the proverb true, *Festinans canis cæcos parit catulos*: he therefore gave liberty for any man to amend the bill before the defendant's appearance, so that it contained the same matter in substance; but this bringing a double charge to the plaintiff, who sued for the king and Commonwealth (and therefore is to have all favour and ease which may be), was within the space of seven years reduced to the course of former times, to have the process before the bill, so that the bill were filed at the return.

I SHALL therefore apply my course both to the former and antient times, and also to present use, and handle the awarding of other process before the filing of the bill. And therefore, in antient times, when complaint was made either of some notable outrage, or fraud to the king, the lord chancellor or council (sometimes the king) by letters missive commanded the delinquent to answer in the Star Chamber. Sometimes any of the council, to whom the complaint was made, sent for the offender, and took him by recognizance to appear in the Star Chamber; which course is yet usual. Sometimes the lord chancellor sent a serjeant at arms to admonish them to appear; some-

times

PART III. times a messenger of the king's chamber served the privy seal; sometimes a *subpœna* was awarded to be served by the party and his servant; and all these kinds of summons or original process I find in the records of *H.* 7. and *H.* 8. And I find in those times, upon a default of appearance in contempt of the king's letters missive, or the summons of the serjeant at arms, the next process was a proclamation of rebellion *sub pœnâ ligeantiæ*, and in the other, an attachment.

And no doubt but the lord chancellor or lord keeper may at this time attach the person by his messenger, or serjeant, and detain him until he find good caution to appear; which in times past every defendant did upon his appearance: but that is unfit to be done in every private cause, unless the non-appearance beget suspicion that he will hide himself. But the next question is, Whether this ordinary process lie against all sorts of people? for the great peers of the realm do deny to appear upon the ordinary service, but require letters of summons, like letters missive, from the lord chancellor or lord keeper, which certainly, for all latter times, have been yielded unto for their dignities. And yet I find in *H.* 7.'s time a privy seal was served upon the *earl of Kent* to appear in this court; and in 3. *H.* 8. the *lord of Abergavenny* warned by the serjeant at arms to appear; and in 11. *H.* 8. the *lord Ogle* was committed for a contempt in breaking a privy seal directed unto him; whereby it appears, that a privy seal was in those days directed unto him, and divers lords bound over to appear by recognizance; so that I doubt of the antiquity of this grace (if it be so esteemed); the king's broad seal being as honourable as the lord chancellor's letter, but only that the other is a more singular course, differing from the common sort of people.

The privy seal, or *subpœna*, for appearance (which I take to be all one) is of one and the same form to all, except only to the inhabitants of the Cinque Ports, which is thus: *Jacobus, Dei gratiâ, &c. Quibusdam certis de causis*

causis coram nobis in concilio nostro propositis, &c. tibi præcipimus, firmiter injungentes, quòd omnibus aliis prætermissis, et excusatione quâcunque cessante, in propriâ personâ tuâ sis coram nobis et concilio nostro apud Westmonasterium in Octab. Michael. proxim. futuri, ad respondendum ulterius quod per nos et dictum concilium nostrum consideratum fuerit in hâc parte; et hoc sub pœnâ centum librarum; et habeas ibi hoc breve. Teste, &c. And upon the back of this writ is indorsed the plaintiff's name who prosecutes the suit, "*J. D. sequitur hoc breve;*" by which it appeareth, that the suit is the king's, and the grieved party but the prosecutor, for otherwise his name and cause should be specified in the writ, as in all writs at the common law, *viz. Præcipe A. B. quòd reddat C. D.* 20l. *quas ei debet, et injustè detinet, &c.* And the form of the writ to the Cinque Ports is in this manner: *Jacobus, Dei gratiâ, &c. prædilecto et fideli suo Edvardo Domino Zouch, &c. guardiano sive custodi Quinque Portuum suorum, sive ejus locum tenenti, seu deputato ibidem, salutem. Quibusdam certis de causis coram nobis et concilio nostro propositis vobis mandamus, quòd sub sigillo vestro detis in mandatum, C. B. et J. B. quòd omnibus aliis prætermissis, et excusatione quâcunq; cessante, in propriis personis suis sint coram nobis et dicto concilio nostro apud Westmonasterium in Octab. Sancti Michaelis proxim. futuri, ad respondendum super hiis quæ ad prosecutionem C. J. sibi objiciuntur tunc et ibidem, et ad faciendum ulterius et recipiendum quod per nos et dictum concilium nostrum consideratum fuerit in hâc parte; et hoc sub pœnâ centum librarum; et quòd habeant ibidem mandatum nostrum prædictum. Teste meipso, &c.*

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THERE was another usual form of writs, in which was contained a clause *quòd ducat secum* all such others as were his servants and actors of any outrage; but the same is now out of use, and the proceeding afterwards ordered by the court: but if any of the writs be left at the houses

of

PART III. of the defendants, so that he come to his house in reasonable time before the return, he must appear; or if he have notice that the same was left there, and also when it was made returnable. But surely it is not sufficient that the party have notice of the label, unless at the time of the service the writ be shewed sealed; for it is the seal which requireth the obedience: and therefore if the seal be shewed, and a ticket of the day of appearance left with the wife or servants, it is a service sufficient; for it may be the delinquent will keep himself from sight; and therefore in times past the process was served in market, or in church; but now it is held a great offence to profane the church by service of process, that being a sanctuary where no man's devotion should be interrupted. But (under correction) I must cleave to antiquity, and hold it no offence to serve the process of law (if *Fortescue* say true, that *lex est sanctio sacra*) in a holy place. For it appeareth upon record, that these processes were usually served there in *H.* 7.'s time, when the church rather abounded with superstition than it wanted reverence or respect, especially if the party cannot well be met in all other places.

BUT to proceed: Upon notice given of the process, if the defendant do not appear, the prosecutor, or some other for him, must make oath (which was in times past called the certificate) of him which carried the process, upon whose testimony an attachment is now awarded by the clerk of the court. But I have shewed in the First Part of this Treatise, that all original summons or processes were granted anciently by the lord chancellor, or the court, and so every attachment to call the party to answer his contempt; at which time I find, that upon slender testimony, or affidavit, attachments were awarded: as, that he which certified received a letter that the *subpœna* was served; which was not greatly inconvenient, for it was awarded to call the defendant to answer; and if at his coming he could excuse himself, that he had no notice, nor was

was sufficiently served, he was discharged of his contempt: for so was the bishop of Norwich, 15. *H.* 8. upon his oath discharged; and we know the heaviest censure is allowed to draw the defendant to answer. But of affidavits I shall speak in the proper place. And as an attachment is awarded against every ordinary subject for his default of appearance, if the peers of the realm will not appear upon the summons served upon them by the letters from the court, or by writs served upon them (of which there be many precedents, and one to the *earl of Northumberland* in 7. *H.* 8.), in case of contempt a privy seal *sub pœnâ ligeantiæ* was awarded against them, and upon their appearance they were committed; which process is the same with a writ of proclamation used instead thereof. And in 6. *H.* 8. an attachment was awarded against the *abbot of Peterborough*, who was a lord of the parliament; which attachment is awarded for the most part to the sheriff of the county where the party is commorant, and the form of every attachment is in these words:

Jacobus, Dei gratiâ, &c. Vic. Midd. salutem. Præcipimus tibi, quòd attachias H. L. ita quòd eum habeas coram nobis et concilio nostro apud Westmonast. in Oct. Sancti Michaelis prox. futur. ad respondendum nobis et dicto consilio nostro tam de quodam contemptu nobis per præfatum A. illato (ut dicitur) quàm de aliis sibi tunc objicientur; et ad faciend. ulterius et recipiend. quod per nos et dictum consilium nostrum consideratum fuerit in hâc parte; et hoc nullatenus omittas; et habeas ibi hoc breve. Teste meipso, &c.

If the sheriff shall not apprehend the body, but return, *that he cannot be found*, then a writ of attachment with proclamation is awarded, the tenor whereof is, *Jacobus, Dei gratiâ, &c.* But if the sheriff attach him, and have him in prison in the gaol, and he be sick, or at the time of the writ delivered have him in execution in the prison; in the one case he returneth, that he is *languidus*, that he

PART III. cannot bring him; and in the other he returneth, at whoſe ſuit he lieth in execution. Then the court will award an *habeas corpus* to bring the priſoner up; and then the ſheriff bringeth him to the court, and the lord keeper (if he be in execution) delivereth him over to the warden of the Fleet, where he lieth, charged as well with the execution as to anſwer the cauſe in this court; and in the other caſe, he either puniſheth or remitteth his contempt. If the ſheriff fail in his duty in not making his return, the court uſually ſetteth a fine upon him of five pounds or greater, either for not returning the writ, or not bringing the body according to the return; which fine is increaſed every day the ſheriff faileth of his duty, upon day given him by the court to bring in the ſame. But if the ſheriff ſhall at any time return, that the perſon is not to be found, when in truth it ſhall appear that he hath been in his company after the writ delivered unto him, then the court will commit the ſheriff to the Fleet. And it may be asked, that ſtrangers not being parties nor preſent in court are not to be committed, but firſt to be attached; but the ſheriff, being a miniſter of the court to ſerve the proceſs, is intended to be always preſent in the court; it being often uſed in the time of *H.* 8. that they were commanded all to be ſworn in the court at ſome ſpecial time; and by the ſtatute-law they are to have deputies in every court at Weſtminſter; ſo that the ſheriff, for any apparent abuſe, is immediately committed, or day given him to ſhew cauſe why he ſhould not be committed.

But if the defendant cannot be apprehended, nor will come in upon proclamation, then a commiſſion of rebellion is uſually awarded,[c] which is directed to as many as the proſecutor will name, giving them charge and authority to apprehend the body of the defendant as a rebel; and the commiſſioners may break into any houſe where the defendant is, to attach him; and either ſend him to the next gaol, or bring him to the warden of the Fleet. For the

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commissioners have a writ of assistance included in the commission; and the defendant, upon his coming in, shall pay all the plaintiff's costs, if the party defendant be not committed. But if he be committed for his contempt, the plaintiff shall not have his costs till the end of the cause, unless by special order. On the other side, if the plaintiff shall unduly sue forth process of contempt, and attach the defendant, he shall pay all the defendant's costs: and one *Watts*, about 2. *Jac.* was grievously sentenced for attaching one *Camden*, being an old man, upon a commission of rebellion unduly sued forth. So likewise, if the commissioners in a writ of rebellion shall molest the defendant, and refuse special bail for his appearance, they shall pay his costs, and be punished; as it was adjudged in *sir Hugh Portman*'s Case, *Trin.* 40. *Eliz.* and the tenor of the commission of rebellion is, the commission of rebellion.

BUT if the defendant can by none of these courses be brought to answer, then the court sendeth a serjeant at arms, who in times past was used to make the first summons; and he hath power to search in all places for the defendant which he shall suspect, to apprehend him and send him up. And in the same form in the time of *H.* 8. an attachment was awarded to the sheriff of Cumberland to take the power of the county and to attach one *Cleyter*, under the pain of 500l.; and the like to the *lord Dacres* of Gilland, being lord warden of the marches of Scotland, to attach divers of the *Ogles*, under the pain of 1000l.; so that howsoever time hath been settled a form of ordinary proceeding, yet the same exceedeth not the ancient course. But now the prosecution is gradative, which was heretofore often used at the first, and so surely may be at any time upon special reasons; the end of all these courses being but to bring the defendant in to answer. But if a person stood out many contempts, in *H.* 8.'s time I find, that when he came in he was fined for his contempt; which is now in use upon the appearance; only he is committed, and, if he

PART III. have ſtood long in contempt, not eaſily enlarged till he hath made anſwer, and he is examined to the bill put in againſt him.

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§. VIII. OF THE FORM OF COMPLAINT.

AND now, becauſe in former times when the party appeared the plaintiff was commanded to put in his bill, and in theſe times upon the appearance the bill is to be ready, for otherwiſe the clerk of the court taxeth the defendant's coſts for his vexation (which is the mere permiſſion of the lord chancellor, or the lord keeper, who for his eaſe parteth with the honour, and may at his pleaſure add unto or diminiſh thoſe coſts), I will entreat of the bill.

THE bill muſt be brought engroſſed in parchment, and filed with the clerk of the court, and by him indorſed; and of later times the day when the ſame is received, is indorſed; which grew upon great reaſon, for that many queſtions roſe upon the time of filing the bill, either upon clauſes of the general pardon, whereby all offences were excepted for which any bill or information was depending in the Court of Star Chamber at any time during the ſeſſion of parliament; in which caſe if the bill were not filed, although proceſs were ſued out, yet the offence was pardoned, and therefore the day of the filing being indorſed, it took away all queſtion; or for aſcertaining of any matter, as where it is ſuggeſted in the bills. But an offence committed in the month of May *laſt paſt*, before this indorſement uſed, was uncertain; but now by the indorſement it is aſcertained, as hath been certified by all the judges of England. It muſt alſo be ſubſcribed under the hand of ſome learned counſel, which, as I have before

fore said, were ever in antient times appointed by the lord chancellor in every cause, and their names entered upon record; which was done to the end that frivolous suits might not be common, and that legal form might be used by able and considerate men, who, attending that bar, would for their reputation be careful that nothing should pass under their hand unfit for the dignity of that court. To which purpose an order afterwards was conceived in the lord keeper *Bacon*'s time, that no bill should be received unless it were under the hand of a double reader, or some of the king's counsel; which also is now out of use; the court perhaps finding that curiousness of form was not so useful as diligence and plainness for that presence: but sure the first use was very convenient and fit. That grave lord keeper *sir Nicholas Bacon*, to adapt all things to the judicature of this court, and to take away prolixity of pleading, did order that no bill should contain above fifteen sheets of paper; and these were by the *lord Egerton* after ordered to be written fifteen lines in a sheet, and not wastefully, the lord allowing much as he did in all things, so in that especially to the orders of his predecessor *Bacon*; often saying, that a man might be charged with more in fifteen sheets than he could answer in a hundred. And surely this was very convenient both for the judges and subjects: for the judges, for that in long and tedious bills there are so many offences contained, that it is troublesome to the lords in their sentences to distinguish them, and the proof to them much perplexeth their memories; which being reduced to some shortness, will much ease them: for the subjects, for that many persons are charged with many offences, and some only guilty; the residue, although innocent, cannot by the course of the court have their costs; and many are unjustly vexed by the colour and pretext thereof; which if bills were refined to a more indifferent length, would not be so frequent as it is.

PART III.

AND thus much for the *filing of the bill*, which muſt always be done before any proceſs of contempt can go againſt the defendant for non-appearance. For the *matter* of bills, I have already declared in the Second Part of this Treatiſe, there only reſteth the *form* of them: and it is to be obſerved, that all bills in this court are to be directed to the king's majeſty, and in the end the offence is to be laid down truly, certainly, and legally. Firſt, the inducement or occaſion, how it roſe; either the title, in caſe of fraud, forgery, or perjury; or, in ſome, for the lawful poſſeſſion; or, in aggravation to the offence, the long continued inheritance. Next, the crime itſelf muſt be ſet forth, with convenient certainty of the time, place, and perſon. Laſtly, a proceſs muſt be craved againſt the defendant, returnable before the king and his council.

FOR the inducement, howſoever ſome of the judges have delivered their opinions, that the title may not be examined in this court, and therefore ſuch inducement is unneceſſary in a bill, and not to be anſwered unto; yet if deliberate conſideration be taken in this caſe, the weakneſs of the opinion will eaſily appear: for no man will deny but perjury was ever examinable in the Star Chamber, and eſpecially ſuch perjury whereby a man was diſinherited; and that before the ſtat. 5. *Eliz.* as will appear by the proviſo in the ſtatute. Then, if upon a trial at law, by a falſe oath my poſſeſſion be taken from me, without proving any lawful title; as for example, the queſtion is, Whether a deed made by me of land were abſolutely or upon condition, and for non-performance my intereſt determines, ſhall not I alledge that it was abſolute, and prove it? and, Can this perjury be determined without the determination of the title? or, Will any man think, becauſe this will determine the title, therefore it ſhall not be alledged in this court? God forbid!

AGAIN, a riot is charged with ſome outrageous attempt in taking away any corn or hay with force or multi-

multitude; is it not a great offence, if this were taken from my possession, which was long and quietly settled, either by judgment in the king's court, or that I was in by descent, without colour of title by the other side, that if the party which took it had good title to the land where the corn grew, and so the possession, yea and the title fitly examinable? and yet the force is punishable, notwithstanding he had good title.

In like manner, if a jury shall be charged to have given a verdict by imbracery or corruption, is it not a greater offence if the verdict were given against the evidence than with the evidence; and yet both punishable.* And yet it is not denied, but that a man may alledge the verdict to be against the evidence; and yet both punishable, it being in the nature of an attaint. But, under favour, not so few as forty juries have been punished in this court for perjury in their verdicts within fifty years, and yet now leave will not be given to alledge that they passed against their evidence; which I fear emboldeneth corrupt juries more in our age than ever was in former times.

I could alledge many examples to this purpose, to manifest how fitly title is to be alledged to induce the matter, and to aggravate it; but to leave the inducement (which a learned man will set down as briefly as he can) and come to the *charge*, that the crime must be set down truly; for if one offence be charged and another proved, there is no bill to warrant a sentence. So was it in the *lord Digby*'s Case against *Meeres*, where a deed was charged to be forged, by which *sir Walter Raleigh* was pretended to lease to *Meeres* one parcel of land lying near Sherborne castle, and the deed proved contained other lands; and so adjudged naught. So in 40. *Eliz.* one *Hayworth* preferred a bill against *Baddam* for forging a deed of his goods to *Baddam* and *Love* by inserting of an (I), and so to make it over-reach a deed made to the plaintiff; and it fell out in proof, that the deed was made to *Baddam* alone, which could

PART III. could not be one with the same deed intended by the bill; so was not held true, and the court could not proceed to sentence.

And of this sort there are infinite examples, for that these exceptions must of necessity be allowed at the hearing, for that it cannot appear before the hearing; for the bill is good if it be proved.

And this charge must not only be laid truly, but it must have convenient certainty, whereby the defendant may give direct answer; for if the offence is not certainly laid, the party is not compellable to answer; and therefore *Reynolds'* complaining against *Vernon* for a libel, which the bill alledged was contained in a schedule annexed, it was adjudged no charge, for that the matter ought to be contained in the bill; and although in offences of extortion and bribery, it be a good charge to say that the defendant hath taken such a sum from *A.* and *B.* and *C.* and divers others, not naming all, to avoid infiniteness; yet so that proof be made of those that be alledged, many others may be proved, and the charge good. Yet this must be observed, that the offences proved must be *ejusdem speciei* not *heterogeniæ*, as it was in *sir* ——— *Bingley*'s Case. And there must be proportion betwixt those that be laid and those that be proved *numero et magnitudine*; as small offences must not be laid, and great ones proved; or two or three laid, and twenty others proved; for so no man can be able to defend himself. And as there must be a particular certainty in the matter, so there must also in the time and in circumstances, as in place and person.

And first for time, it is convenient for order's sake, that a time should be alledged; and therefore in the *Lord Morley*'s Case against *sir Henry Colt*, the offence was alledged to have been committed within the instant month of September, and the bill was indorsed in October, and no other time alledged in the bill; and so, for want of time, the bill was held not good. But in *M.* 44. *Eliz.* there

there was a Caſe wherein one *Hogg* was plaintiff againſt one *Phinian*, for a practice in *Phinian* to cozen *Hogg*, a poor vicar. The practice was laid 38. *Eliz.* and the execution was afterwards in the 29th, which was impoſſible; but the bill concluded, that all the offences were committed ſince the laſt pardon; which was held to be ſufficiently certain, and the other time laid impoſſible was void: and that clauſe was omitted in the *lord Morley*'s bill; which if it had not been, was held to be good.

AND as in time there muſt be convenient certainty, ſo muſt there be a place laid in the bill, either pariſh, village, or town, where the offence is laid to be done. As for example, one *Lewis*, of London, complained for a riot committed upon his perſon in *Cole-harbour*, but did not ſhew where Cole-harbour was, in what county or city; yet becauſe it was a known place, it was held to be certain enough for the place. And for theſe two circumſtances of *time* and *place*, the court of late times is not troubled, for that the *lord Egerton* in *Mich.* 3. *Jac.* made an expreſs order, that no man ſhould take exceptions at the hearing for ſuch uncertainty of form, wherein he might have excepted by way of pleading.

As for the certainty of *perſon*, he that ſhall be charged in this court, muſt be charged by his true name; for if *John* be charged in the bill, *Thomas* cannot be puniſhed, although he made anſwer; for ſo it was adjudged in *Vaughan*'s Caſe, *Hill.* 2. *Jac.* where proceſs was prayed againſt *Rogers* and *Alice* his wife, and his wife's name was *Ann*, and ſo ſhe anſwered; and it was held no anſwer to that bill. So the anſwer of *Penelope counteſs of Devonſhire* to the charge of a bill where ſhe was called *Penelope lady Rich*, ſhe being then ſeparated from *lord Rich*, was held no anſwer, in *ſir Richard Champernon*'s Caſe.

BUT a riot is well charged to be committed by *J. S.* and three others unknown, for the penalty only goeth to *J. S.* and the others are not hurt till they are named; and

when

PART III. when they are discovered, by a rule of *lord Egerton*'s they may be inserted into the bill at all times within one whole Term after the bill exhibited, yea and afterwards by order of the court, when some defendants are discovered by examination of the others.

I HAVE further said, that it must be laid down legally; wherein I would not have it understood that every punctilio must be stood upon; for there be divers orders straitly inhibiting such strictness of form; for which there is a notable order entered of record, upon conference with the judges in 32. *Eliz.* As, if I charge the party to have committed an outrage in the night, with a multitude of people armed, hurting and wounding divers persons; although I do not say that it was riotously, as I ought to do in an indictment, yet it was adjudged a good charge in *Reynolds'* and *Vernold*'s Case, 10. *Jac.* for that the matter which made the riot was alledged in other words. But in the *earl of Northumberland*'s Case against *Burr* for forging and publishing a deed, the publication of the forged deed was proved against the defendant; yet because he was not charged to have published it knowing it to be forged, which makes the offence in the publisher, and is the apt legal charge, the defendant was dismissed; but, upon a new bill, was afterwards sentenced for the offence.

So in a charge for conspiracy, if it be not laid that they did agree falsely and maliciously to indict the party, it is no conspiracy; for if it be maliciously, yet if it be true malice, it is a good informer, although a bad judge. And if it be false, yet if it be not malicious, it is not punishable; for circumstances may give the indictor good cause to believe it to be true; as it fell out in *Rochester*'s Case, who was indicted for the death of one *Solm*, whom *Rochester* struck, and in short time after he died: and although he died not of that hurt, yet had *Solm*'s son, who indicted him, just cause to believe it to be the cause of his father's death. But I shall not need to extend this

part,

part, for that the exception to an illegal charge in a bill is fitter to be taken by pleading than at the hearing, and then the judges upon hearing counsel will determine of the same.

I NOW draw to the *conclusion* of the bill; where the plaintiff must be careful that he pray his process against all those that he will make defendants; and that by their right names: for if he shall charge a man, and serve him with process, and not craye process against him, he is to be dismissed with costs; as it was ordered in *Hutton Fowler's* Case in 36. *Eliz.* and many more since; and the process must be prayed returnable in the proper court, which is *coram rege et concilio*; for otherwise, how shall the defendant know where to make his appearance? And the process must be prayed as it is directed, or otherwise the bill doth not warrant the process; of which there must be due regard had, otherwise every cause will be confounded in another; and therefore the process must in all be as the bill. For if the bill be in the name of *Grant*, a process at the suit of *Grant* is not warranted by that bill; and a bill at the suit of *J. S.* doth not warrant a process at the suit of *J. S.* and *J. N.* as it was held *Hill.* 3. *Jac.* betwixt *Wright* and *sir Anthony Felton.*

AND thus much for the bill, and the filing thereof, which is ordered to be without fees; only two shillings is paid for the warrant of the process, if it be not sued out before the bill filed, and no other fee taken for any other warrant upon the bill.

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§. IX. OF THE DEFENDANT'S APPEARANCE.

THE bill being duly filed, which the plaintiff may perform by himself or his attorney, the defendant is now to make his appearance, which (without special favour) he ought

PART III. ought to do in perſon; and that appearance may be made upon proceſs, or without proceſs: upon proceſs of *ſubpœna*, letters miſſive, or recognizance, as I have before alledged: without proceſs, when any perſon of worth or honeſty hath a ſcandalous bill filed againſt him, having notice thereof, he may appear *gratis* to purge his reputation; and yet he ſhall have his coſts; as it was adjudged in the Caſe of *ſir John Luſon*, who appeared to *mr. ſerjeant Hale*'s bill, and had coſts.

OR, if any man have notice that proceſs is gone out againſt him, he may tender himſelf before the day; but the plaintiff in that caſe cannot be compelled to put in his bill till the return of the proceſs: but if proceſs be ſerved upon a man in which his name was miſtaken, he need not appear at all, if he pleaſe. If that the appearance be not made until after the return, there hath been uſage, that the defendant ſhould pay four-pence for every day after the return, and before any attachment awarded for his *poſt diem*; which money was wholly and ſolely employed to the poor man's box; and how diverted of late I know not, yet ſurely not to the antient uſe. And for the entry, or recording of the appearance, every man payeth two ſhillings; that is, one ſhilling to the clerk of the court, and one ſhilling to the uſher.

IN former times this appearance was always taken before ſome lords, and either in court or council chamber, or in the lord keeper's houſe; and of latter times before the clerk of the court, who went ſometimes (very rarely) to take the appearance of the defendant; for which he hath ever had the fee of ten ſhillings; the gaining whereof hath cauſed the under-clerk to attend all perſons of any eminence, to take their appearance at their houſe or lodging; which is a great derogation to the dignity of this court, and fit to be looked unto, leſt in ſhort time it breed contempt and much diſhonour thereunto. And it is to be noted, that although the plaintiff who is the proſecutor

be

be disabled by outlawry, excommunication, or any other means in the defendant's knowledge, yet must the defendant yield his obedience to the process, to attend the court, until he hath pleaded that disability, and the same appear unto the court upon record; at which time the king's attorney may, if he please, supply the plaintiff's defect, and prosecute the cause for the king; and if he shall fail to appear, an attachment shall be awarded before the defendant's appearance.

THEN must he enter into a bond not to depart without license of the court, which, in antient times, was done upon every appearance, and in those days most commonly with sureties to appear *à die in diem*; which was long time used, but now never used but upon great cause, and the special command of the lord keeper, or the court; but now his appearance is received, paying ten shillings for the fees of the attachment. But it happens many times, that the defendant cannot appear by reason of age, sickness, impotency, or imprisonment, necessary employment in the king's service, or such-like lawful causes; all which, if faith be made of it by oath, doth amount unto an appearance; and doth not only excuse the contempt, but, upon his request, he may have a commission to take the answer or examination in the country, directed to commissioners; which were at first especially appointed in all counties by the lord keeper; but, after, indifferently chosen by the parties, and time and place appointed, and agreed upon, the manner whereof I shall declare hereafter in their places. Sometimes the defendant doth appear after attachment awarded; yet upon oath, that he was hindered by waters, or any casual misfortune, or that he had not notice of the *subpœna* till after the return, or not in such due time as he could prepare himself for his journey, if he live in remote parts, his contempt shall be excused. These excuses were heretofore allowed by the

lord

PART III. lord keeper, lord chancellor, or the court; but of late, bonds are taken of him not to depart without license, which lie in court without use, only the clerk's benefit for taking them.

THE appearance being entered, the defendant must now retain his attorney, who must take the record of the bill from the file, and copy it for the client, which the clerk of the court ought to deliver: but if no bill be then filed of record, then is the defendant to have his costs for his travail, which, in former times, were taxed by the lord chancellor, but now by the clerk of the court; which are allowed to all persons, yea even to those which are *in formâ pauperis:* for as the *lord Egerton* used to say, although they paid no fees, yet they must pay for victuals and lodging. Yet is not this rule so general that it holdeth in all cases; for in the king's case, the defendant is to attend for the bill by the king's attorney, or almoner, and cannot be discharged without their assent.

THE copy of the bill being made, the defendant is to pay for the same twelve-pence for every sheet, whereof six-pence the attorney is to pay to the clerk of the court, and six-pence he is to keep to himself, by the established orders of the *lord Egerton* and the judges; and by the same, ordered the attorney to subscribe the copy to agree with the record, and put his name, as a testimony thereof: and the client nor attorney shall be compelled to attend the clerk of the court for his subscription, as formerly was used; for which the clerk had always two shillings; but since these latter orders it is wholly left, to his great prejudice much more than the value of his subscription, by the abuse of under-clerks in their false accounts for copies.

THE bill thus copied by the defendant's attorney, it is then, or should be, carried to counsel to draw answer; who were heretofore always in all cases appointed (as I have said) by the court; but now of late (such is the abuse), a care-

a carelefs anfwer is drawn by an ignorant clerk, and more fimple counfellors hands gained unto it, for half fee, and fo the court filled with frivolous and infufficient pleadings.

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§. X. OF THE DEFENDANT'S ANSWER.

HAVING now furnifhed the defendant with a copy of that which is fuggefted againft him, and fent him to his counfel to be well advifed what anfwer he fhall put in, I will firft fhew how the anfwer is to be put in, in general; and in the next place fhew, that defendants do either anfwer in court, or by commiffion in the country. By ordinary courfe the defendants have eight days to frame and bring in their anfwer into the court; unlefs in fome cafes, by reafon of the weight of the matter, tedioufnefs, or intricacy, or fhortnefs of the Term after the return of the procefs, the court will fhew grace upon motion, in giving longer time. But if the defendant's counfel find that the bill containeth matter of title, which they cannot anfwer with fafety without fight of the defendant's evidence or writings; then, upon oath made that his evidence or writings are in fome remote part from the court, he hath time given him to anfwer until the next Term of courfe by the clerk of the court. But counfel being to frame the anfwer, which cannot be done without conference with the client, and mature deliberation, the defendant muft either put in a plea, demurrer, or an anfwer, or (as *ferjeant Hale* did) an anfwer having all thofe titles; and thofe are not tied to any certain proportion, but are left to the difcretion of the counfel, for that occafion may be fometimes to draw them fhorter, fometimes longer. But if it fhall be ftuffed either with fcandalous matter, as the committee to whom it is referred fhall affefs—who hath power

PART III. ſo to do by an order of the court to be taken in *M.* 35. *Eliz.*—but if there be ſcurrilous or ſcandalous matter, the defendant ſhall be committed, yea the counſel whoſe hand is to the anſwer (as none can be received without a counſellor's hand) ſhall be grievouſly rebuked, and ſometimes ordered that their hands ſhall not at any time after be taken to any pleading in this court, yea and ſometimes committed to the Fleet; of all which examples are innumerable.

A PLEA is ſome matter of record, and, as the lawyer ſaith, containing matter *dehors* (out of) the bill; which being alledged, barreth any further proceeding in the cauſe. And this may be of divers ſorts, either to the diſability of the perſon of the plaintiff, to the juriſdiction of the court, or to the matter of the charge.

A PLEA to the diſability of the perſon, is either an outlawry or excommunication, and conviction of felony, *præmunire* or recuſancy, conſpiracy or rebellious contempt, in the ſame court; in all which caſes, the defendant is to plead the conviction truly; and in outlawry or excommunication he is to annex the ſame *ſub pede ſigilli* of the ſeveral courts where the plaintiff is convicted, and affix them to his plea; and theſe are accepted without oath, becauſe the ſeals give faith unto them.

BUT it hath been a queſtion, What ſeal ſhould be annexed to the outlawry? And the *lord chancellor Egerton* would allow none but the great ſeal, and the whole record of the outlawry ſhould be pleaded; but the lord chancellor *St. Alban*'s allowed the ordinary ſeal wherewith writs of *capias utlagatum* are ſealed, with the *capias utlagatum* only annexed: and the *lord Egerton*'s reaſon was, becauſe the plea was in delay of the plaintiff. But in all other caſes the defendant is to put in his plea upon oath, to give certainty that it be not feigned; and in all he doth demand judgment, whether the plaintiff ſhall be anſwered; and in all theſe caſes the plaintiff is barred till he reverſe

the outlawry, and procure abſolution, and in other caſes ſet himſelf ſtraight: and by the *lord Egerton*'s rules, if he do not the ſame within two terms, he ſhall be diſmiſſed with his coſts.

A PLEA to the juriſdiction of the court is, when a perſon living in the Stannaries or Cinque Ports is called to anſwer, and ſhall plead, that by ſeveral charters of kings of this realm they ought to be impleaded before their warden, who hath power to puniſh them for their offences complained of, if they did demerit; and therefore prayeth judgment, whether he ſhall make other anſwer in this court. Or ſometimes the defendant will plead, that the offence was committed within the principality of Wales, or county palatine of Cheſter or Lancaſter, and in theſe caſes is puniſhable. Theſe and ſuch-like pleas to the juriſdiction of the court in which judgment was prayed, whether the defendant ſhall make further anſwer, are all put in upon oath, and do ſuſpend the cauſe till the ſame be over-ruled.

A PLEA to the matter of the charge ſometimes admitteth the matter, and yet alledgeth foreign matter of record, that he ought not to anſwer it; as if a perjury be complained of to have been committed in an anſwer in the chancery, or in a depoſition there, the defendant ſheweth the cauſe wherein the perjury is ſuppoſed to have been committed doth yet depend undetermined, and ſo demands judgment.

SOMETIMES the defendant confeſſeth the matter, and yet ſheweth that he hath been *autrefoits convict*, and puniſhed in another court; and demandeth judgment, whether this court will proceed to puniſh him again.

SOMETIMES the defendant denieth the ſuggeſtion, and confronteth the accuſation, and maketh good his denial by many trials at law paſſed for him, and the judgments and ſentences of other courts; and demandeth judgment, whether, after ſuch legal trials, he ſhall be troubled; in all

PART III. which cases the defendant is not examined till the same be over-ruled, neither ought he to be further prosecuted: but if in these latter times, and in these latter cases, and the like, he doth without better answer submit himself to examination, and the cause proceed to examination of witnesses, and come to hearing, this plea to the matter doth supply the place for an answer; as was lately adjudged in *Hoskins'* Case against *Martington*.

DEMURRER is admission of the bill *pro tempore*; and yet for something therein contained matter is alledged, that the defendant ought not to make any answer; and that is either for insufficiency of matter or of form.

INSUFFICIENCY of matter is alledged, sometimes, that the matter in charge tendeth to accuse the defendant of some crime which may be capital; in which case *nemo tenetur prodere seipsum*; or upon a penal law, where he is to forfeit his goods: sometimes, that the matter is proper for ecclesiastical cognizance, as defamation, or such-like: sometimes, that it is petty or trivial, and so not worthy the dignity of the court. These and such-like are causes of demurrer for insufficiency of matter.

DEMURRER for insufficiency of form hath sometimes been for the extraordinary length of the bill above the allotted proportion of fifteen sheets: but it was long since over-ruled, that the defendant ought to be recompensed by costs for unnecessary length, and no cause of demurrer. But demurrer is in all cases where there wanteth certainty, or legal words of charge in the bill; of which I have spoken before. And all these demurrers demand judgment whether the defendant shall make further answer; which are to be put into the court by the defendant in person, and not by his attorney, as the *lord Egerton* held it strictly. But if he rest not upon the demurrer, but plead over denying the matter, then is the demurrer waved, and the defendant proceedeth to examination. If they rest upon the matter in law, then must it be over-ruled; which is done

done either by referring it to the same judge, or to the king's counsel, or by the judgment of the court upon public motion, or the lord keeper's private opinion. The two former are usual in demurrers to form and matter; and in pleas to the matter of the bill; and to consider if disabilities be legally pleaded. But in pleas or demurrers which sound to the jurisdiction of the court, the two latter are most usual, and most safe for the honour and dignity of the court; and if the same being referred by order, be adjudged against the defendant, or otherwise over-ruled, then is he in ordinary course to pay the plaintiff for his charges and delay forty shillings; and many times much more, if the court conceive the plea or demurrer to be put in only for delay, or to confront the court; as the *lord Houghton* paid ten pounds to *sir Edward Coke*.

But if his plea or demurrer be held good, then is he absolutely dismissed with his costs; yet if there be many charges in a bill, and the defendant demurreth to them all, and the judge certify the demurrer good for all but one only, which he must answer, in that case the defendant shall pay forty shillings costs, for that the certificate is for the plaintiff's advantage: and if the plaintiff procure no reference or motion of the same; or if after the same be referred, the plaintiff let it rest, and doth not prosecute it; by an order taken by the *lord Egerton*, if the certificate be not procured by the plaintiff within two Terms after the reference, the defendant is to be dismissed with his costs. But that is to be understood always, if it be by the plaintiff's neglect; for many times the judges' leisure will not suffer them to determine some long and intricate cases. But upon the judges' certificate, if the same determine the matter which is referred, that the defendant ought to make a better answer, thereupon doth the clerk of the court make a warrant to the process-maker, to make a *subpœna ad faciendum meliorem responsionem*; which is only in the form of the first *subpœna*, but that the same is in-

PART

dorsed with these words, *ad faciendum meliorem responsionem.* And if default be of appearance, process of contempt goeth (as is formerly declared). But if the judges determine not the matter of the plea or demurrer, and so leave it to the better judgment of the court, then must the court be moved upon the certificate, and the defendant is thereupon dismissed, or ordered to make better answer; and upon that answer, the clerk of the court maketh this warrant to the process-maker, to make a *subpœna ad faciendum meliorem responsionem*; whereupon the defendant must answer. For if he should delay with the court several times by dilatory pleadings, if the same be certified against him a third time, he shall be committed, and not delivered till he hath answered; and the costs are doubled upon every certificate.

THUS having brought the defendant in to answer, he must by his answer either confess the offence wherewith he is charged, and submit himself to the mercy of the court, which in case he be guilty is his surest and most advantageous way; which was used in *H.* 8.'s time to be upon the table in their shirts, by men of great worth (*viz. Devereux* and divers others submitted themselves in their shirts upon the table in the court, and *sir William Butler*, *sir Mathew Brown*, and *sir John Leigh* submitted themselves to the king in the court; and were pardoned); or else he must absolutely deny it; or he must justify the fact by reason of some title, or provocation, and plead over to the manner, which is a better course than an absolute denial; for a mild answer abateth the sharpness of a bitter bill, and assuageth the edge of severity, when it is open to the court; and in any of these the plaintiff may examine upon interrogatories.

JOHN JONES, *register del dioces, et un alderman del citty de Gloucester, fuit trahe en cest court* (*enter autres choses*) *pur maintenance. Il plead non culp. et puis per ses testimoignes prove que il ne ad maintayne; mes al oyer ceo fuit reject, et*

le

le maintenance solemment examin. pur ceo que doit aver ceo defend. per ses testimoignes. Ceo fuit sentence Hil. Car. R. 1.

AND the answer must be engrossed in parchment, and subscribed by counsel, and so brought to the clerk of the court, who is to give the defendant his oath; which is, that so much of the answer as containeth his own act and deed, he knoweth to be true; and so much as containeth another man's, he supposeth to be true; and he sweareth likewise, that he shall make true answers to such interrogatories as shall be ministered unto him concerning that cause: and thereupon the clerk writeth *Jurat.* and puts his hand thereunto; and this subscription of him is a testimony against all men, that the defendant was sworn, although the same were done alone, and the defendant will deny it; as was notorious in the *lady Ross*'s Case, who wickedly denied that she was sworn to cover the falshood contained in her answer and examination. This being done, the record is delivered over to the plaintiff's attorney to be copied for him, for which he payeth by the sheet, as the defendant did for the bill.

BUT here doth arise another question, Whether all men should be sworn to their answer? And the lords of the parliament say, that they ought not to be sworn, but only should answer upon their honour: and I know that *Henry earl of Lincoln* stood upon this in queen Elizabeth's time; but in vain, for he was over-ruled in it, and did answer upon his oath. But because it is held an encroachment, let us look into former times. In 6. *H.* 8. I find that the *earl of Northumberland* had a day given him to appear, and to deliberate, *an velit directè respondere causis versus eum exhibitis in hâc curiâ, secundum modum & ordinem curiæ; vel si velit submittere pietati domini regis in omnibus.* But it is true, that what is *modus et ordo curiæ* doth not ap-[illegible] and afterwards he did submit himself to the king in all; but I conceive it to be such a privilege which he then stood upon. But in 11. *H.* 8. the *lord Ogle*, sworn upon a

PART III. book, confeffed his fault; and in 15. *H.* 8. the *bifhop of Norwich corporale præftitit juramentum*; and in 17. *H.* 8. the *lord Morley* made oath for a contempt; and in latter times I could fhew many of that nature; but thefe fhall fuffice to manifeft, that the fame was not encroached upon the nobility in the *lord Egerton*'s time, as fome have alledged.

AND fo I conclude, that I know not any fort of people (except corporations) freed from putting in an anfwer in this court by oath; for the body politic is without a foul, to be tried by oath; for attornies do not make oath there, as in the ecclefiaftical courts, *fuper animam magiftri*; and all things are done againft corporations in court by their attorney, who by law muft be authorifed under their common feal; and if any depart without anfwer, an attachment fhall be awarded againft him. But if any perfon fhall refufe to anfwer, being imprifoned, he fhall have day given him, and be clofe imprifoned; and if that will not prevail, he fhall, by another day, have the bill taken *pro confeffo*; or fometimes he is kept with bread and water, as young *Booth* was.

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§. XI. OF EXAMINATION.

AN anfwer is not perfect without examination; and it is part of the oath taken, to make true anfwer to the interrogatories, which in antient times was called *examinatus fuper refponfionem fuam*; for to any offence a man in a continued courfe may make a plaufible anfwer; but where in his own excufes a fhort queftion is afked him to which he muft anfwer, the nakednefs of his excufe is difcovered, as *Adam*'s was. And of this kind of examination there are excellent precedents in the time of *H.* 8. when the examinations were taken by the lord chancellor in the court, where the interrogatories were never above fix or feven, and thofe every

every one a short question. As the *bishop of St. Asaph* in 10. *H.* 8. being charged for the receiving of the pope's bull for confirmation before the king's license, whereupon he was interrogated, *An fecerit homagium suum regi minus consecrationis receptum? dicit, quod non.—An habuerit assensum regium assensum suum cum sibi ante minus receptum? dicit, quod non, nisi solum assensum suum cum sibi conferrent episcopatum.—An pronunciavit juri suo in omnibus per sanctissimum patrem pro provisis, et etiam omnibus quæ sonarent in detrimentum regni seu læsionem coronæ et dignitatis suæ ante minus consecrationis receptum? dicit, quod non.* Which bishop being put to his choice, whether he would stand to his defence, or submit himself to the king's mercy, submitted himself at bar, and craved pardon. But afterwards this advantage of examination was used like a Spanish Inquisition, to rack men's consciences, nay to perplex them by intricate questions, thereby to make contrarieties, which may easily happen to simple men; and men were examined upon one hundred interrogatories, nay, and examined of the whole course of their lives; but that was grounded especially upon the weakness of the defendant, who is sworn to answer no other interrogatories but such as concern the cause. But to prevent this vexation, the court gave the plaintiff only four days liberty for him to copy, peruse, draw, engross, and put in the articles whereupon the defendant is to be examined; and these were to be drawn and subscribed by counsel, who should be ashamed to draw such immaterial questions, or so infinite, especially such a counsel as understands the course of that high court. But clerks, finding commodity would come to themselves, draw the client easily from the charge of attending counsel, but brought a terrible charge upon the client of length of book, and so perplex the court with tedious matters to no purpose, and draw a scandal thereupon of infinite expence; which with little consideration would be eased, if it were restored to antient course, and counsel learned

PART III. and discreet appointed by the court. But to ease the subject, the lord keeper *Bacon* made an order, that upon no bill the defendant should be examined upon above fifteen articles, and those are not to contain above two questions in any one of them; and if there were any more impertinent, the plaintiff should pay fifteen shillings the article for every one of them which he so administered; which order is in force to this day.

AND the lord chancellor *Egerton* went further: that if any of these fifteen interrogatories did examine the defendant upon his life, whether he were a thief or innocent, or of any crime not charged, nay, to examine a knight whether he had not hedged or ditched in his time, to disgrace him, not only the plaintiff himself, but any one which drew these interrogatories, was committed: Yet it is usual to put thirty, forty, yea fifty interrogatories, and each to contain twenty or thirty questions; and this done by busy clerks or ignorant counsellors.

IF the defendant shall depart after his answer put in before he be examined, an attachment is awarded against him for his contempt, upon the examiner's certificate that he doth not attend him; but if upon his entering into examination he find the interrogatories in multitude or impertinent, he may repair to the lord keeper, or the court, and pray that they may be considered of; which is so done; and then, if after reference he depart before examination, a *subpœna* is awarded against him to appear in usual form; but the same is indorsed *in his verbis*, *ad faciend. responsionem interrogat.* But when the defendant cometh to be examined, the same is done privately, and apart, that the defendant can have no advice to answer; neither may he or his counsel have any sight of the interrogatories to give him any directions, but the examiner readeth an interrogatory, and requireth an answer to the same, and then readeth another; by reason whereof if he affirm a falsehood at first he is taken in an error, whereby he is compelled to

reform

reform his error; and this examination may be in any part amended by him before he putteth his hand thereto, whereby he doth acknowledge it to be that by which he will abide.

But the plaintiff can adminifter interrogatories but once; for although, after he hath feen the examination, he could clear the caufe by afking one queftion, yet fhall he not have that advantage, for *non oportet quenquam errare bis*; and in this warfare his error is deadly to his caufe. But the defendant is tied to give a precife and direct anfwer to the articles, as well concerning the fact charged, as any circumftances which are pertinent to reveal the truth. And for matter of his own act, he muft not anfwer to his remembrance, but directly: but for words fpoken whereby collection may be made of the fact, it hath been held, that thefe may be anfwered by his remembrance. But if the words be thofe for which he is charged in the bill, he muft anfwer them certainly. If the defendant will not anfwer directly to any material queftion which ought to be anfwered, then, after the examination finifhed by the examiner, and the copy delivered to the plaintiff, the plaintiff may move the court to have the fame referred to the confideration of any judge, or the king's counfel; who, conferring the anfwer with the interrogatories, will certify his opinion. If the counfel certify the articles not well anfwered, then the defendant payeth the plaintiff twenty fhillings cofts, and upon the certificate the clerk of the court awardeth a *fubpœna* againft the defendant, *ad faciendum meliorem refponfionem* to the interrogatories. If he fhall anfwer infufficiently the fecond time, upon the certificate, the cofts are doubled again, and the defendant committed till he will anfwer. And fo I have known fome to continue in contempt during their lives. So did *Thomas Ellis ad fectam Hill*, for that he would not reveal the names of fome perfons he fet on work to commit an outrage. For in cafe of interrogatories

PART III. ries it cannot be taken *pro confesso*, for that is but a question, and no position, as a bill is. But if the plaintiff procure a reference, and do not attend the committee, and procure a certificate within two Terms, the defendant shall be dismissed with costs, unless he can shew good cause to the lord keeper, or clerk of the court.

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§. XII. OF PARDONS.

HAVING entreated of pleas, demurrers, answers, and examinations, I have omitted to treat of one kind of pleading very frequent in latter times, which is, the pleading of the king's pardon; which because it yieldeth many questions, and, as I conceive, is not tied in all cases to the certain time of putting it in by way of answer, I have therefore thought good to handle it by itself.

PARDONS are of two sorts: special or general. Special pardon for a particular offence which is complained of in this court, when the king doth pardon any suit here depending, as *sir Edward Coke* hath declared, although the same be granted when the cause is ready to be heard; for such a one *sir Pexal Brocas* obtained 10. *Jac.*: and this may be pleaded at any time, so it were granted *puis le darrein continuance*. But if the king grant a pardon for an offence before it be complained of, and the party being called to answer will not plead it, meaning to use it at the hearing of the cause, he hath lost the benefit of the pardon; as the *lord Popham* held it in *Fenner* and *Warren's* Case; but his duty is, at the next time he is called into the court he must plead it, and shew it forth under the seal, and crave that it may be allowed. Sometimes the defendant disavoweth the benefit of the pardon. So did *sir Robert Sheffield* in 10. *H.* 8. submit himself to the king's mercy upon his knees, upon the table, before the lords;

lords; and so did one *Cooke* about the same time; but that was, for that his writ of allowance for the pardon was surreptitiously obtained. But it hath been questioned, Whether the pleading of a pardon be not a confession of the offence? or if a person plead a pardon, Whether he may be received to deny the offence? or, Whether the pardon shall be allowed, unless the defendant humbly acknowledge the offence? And in *Werglin*'s and *Manning*'s Case, where the defendants plead a pardon, and would afterwards have relinquished it; for that the court refused to give them leave, unless they would relinquish it for all; and thereupon the court proceeded not; but the *lord chancellor Egerton* made that the reason of his decree against the defendants in chancery whereupon he overthrew old *Werglin*'s will, made with the greatest perfection that ever I knew any: which error, I hope, God hath pardoned; for surely a man may plead his pardon to save his expence, although he be innocent of the crime; as that learned gentleman *sir John Walters* said in that Case, he would never neglect God's pardon and the king's. And it is to be seen in 7. *H* 8. *sir John Denham* pleading the king's pardon, he pleaded and craved the allowance with protestation of his innocency; and although great deliberation was had with the judges and king's counsel about the pleading, yet the pardon was in open court allowed him. And although a pardon be pleaded, yet shall not that wholly determine the cause, as pleas and demurrers shall do: for after that plea the court may proceed for the plaintiff's relief, although the king's fine be gone; as it was adjudged betwixt *Read* and *Lygon* in 1. *E*. 6. and in 34. *Eliz.* betwixt *Brewerton* and *Starkey*. Yea, and at all times upon special pardons pleaded which are obtained after the suit depending, he which pleadeth the pardon must pay the costs of the plaintiff expended before the pardon pleaded: but it is to be otherwise when the defendant pleadeth a general pardon; for the plaintiff is the rather to blame to question him, knowing that the offence

PART III. offence is pardoned. Yet that grows also questionable, for that the same general pardon is not of force, unless the same be pleaded; and he cannot tell whether the defendant will plead the same or not; but surely the same hath been a great question, whether the courts of justice shall take notice of the general pardon without pleading, as the judges do upon trial of life, these causes being criminal, and trenching almost as far as life; and the court for many years did give allowance upon the parties demand at the hearing, without pleading.

But it seemeth, upon the consideration of the many exceptions both of persons and offences contained in general pardons, and *sir John Denham's* Case, and other precedents, the same by opinion of the judges hath been denied, and so strictly been observed, that unless the defendant plead the general pardon by way of answer, it cannot be allowed him. For it was denied to those of the Dutch nation who were denizens, to be pleaded by way of rejoinder; for seeing they might have pleaded it by way of answer, they surcease their time.

But in some cases the general pardon shall be allowed to the defendant at the hearing, without pleading by way of answer; for whereas all offences which have depended above eight years in the Star Chamber are pardoned wholly, and those that have depended above four years the corporal punishment is pardoned, in those cases the pardon cannot be pleaded by way of answer: and if it should not be allowed by way of demand, it were in vain to have it inserted.

And that this hath been so allowed at the hearing, may be seen in the Case of *Golding* against *Sharp*, *M. 8. Jac.* as in divers other Cases. Yet let me observe this, that the general pardon may be pleaded after a demurrer put in, or any insufficient answer; as it was adjudged in *Stephens*, and *Dodd's* Case, and in the Case of *Brooke* and *Oldfield*. The court may refer the consideration of a plea of a pardon

don to be considered of; and if it be not legally pleaded, he shall be ordered to make a better answer, and then he may plead it better. Yet there be some Cases wherein the court usually taketh notice of the pardon, without pleading; and when persons have committed contempts in non-appearance, and process of attachment is prayed against them, upon allegation of the pardon by the attorney, the process of contempt is stayed; and yet it seemeth, that in strictness of law the process ought to proceed. And I well remember, that the *lord Egerton* was of that opinion in the Case of *Henry earl of Lincoln*, and asked me *who* had authority to allow of the pardons but the court, and not the clerks: yet the *lord Egerton* was of opinion, that where the contempt was pardoned, the plaintiff should have no costs for his process of contempt. But all cannot plead this general pardon; for an alien born, not denizen, who is only a subject *ratione loci*, is no subject intended within the benefit of the parliament to be pardoned; and so it was adjudged in the *Dutch* Case; and yet they pay subsidy (as was then alledged), which moveth the pardon.

And note, that upon the plea of the pardon, which must be put in by the party himself, the party is discharged without examination upon interrogatories, although the court should be pleased to proceed for the plaintiff's damages, or other relief; for the plaintiff shall in that case make his proofs, and not help himself from the defendant's examination, that being only a prerogative annexed to the crown, and not civilly allowed betwixt party and party, unless in case the plaintiff will be concluded by the defendant's own examination. And it hath been much questioned, whether in case of forgery upon the stat. 15. *Eliz. Dyer*; and there held, that he pardoned the corporal punishment; but that was after sentence, and the party may release the costs and damages, and yet they are parcel of the sentence. But of this I have spoken in the Second Part in treating of forgery.

§. XIII.

§. XIII. OATH OF SERVING PROCESS, AND OF OATH FOR EXCUSE OF APPEARANCE.

HAVING passed through the process of the court to bring men in to answer, I touched the ground of process in contempt; which is an oath to charge the party with the contempt. For it is great reason, that as the defendant shall be punished by commitment to the Fleet, if he do not appear, being sufficiently admonished to appear; so likewise, if the plaintiff will either by himself or any other make a false oath that he was warned sufficiently, when in truth he was not sufficiently warned, or perhaps not at all, then the plaintiff for such vexation shall be subject to punishment. For which purpose, before any process of contempt is awarded, the oath of him which testifieth the service of the process is entered upon record, and sworn unto; which affidavit was antiently made before the lord chancellor or lord keeper: but in the time of *cardinal Wolsey* in the 18th year of *H. 8.* there was an order entered, that upon affidavit made, process should go forth in ordinary course, so that the oath was made before a master of the chancery; but of late times, the same hath been denied to be read in the court; as it was in *sir Stephen Proctor*'s Case; and since that time the clerk of the court hath authority to give the oath, and to keep the same upon record; that if the defendant be unduly vexed, he may take his remedy thereupon.

BUT it is to be observed, that although the oath be false, the other party cannot confront that oath with another, so that the second oath doth stand with the former, that both may be true; but if the first oath be false, the party grieved may take his remedy by bill, but he ought to be committed.

THERE was in antient times no oath made for the service of any process, except only for appearance and injunction,

junction, by reason that the parties did always personally attend the court; and since that time that they had liberty to appear by attorney, the defendant is called to rejoin, or join in commission to examine witnesses by process, and to hear judgment by process, and to pay costs by process; all which he was ordered formerly to do, and was to perform it at his peril. I shall therefore shortly set down what oaths have been held sufficient in all these cases to compel the person to appear, and what oaths have been held sufficient to excuse the persons which are served to appear.

And an oath of shewing the writ to the plaintiff-party, and delivering a ticket, or leaving the same at his house of abode, so that he were there, or he which served it was told by any child or servant of his that he was there, before the return, hath ever been sufficient.

But if a messenger were sent from the court, or if the sub-almoner, who is known to the court, make the oath, then his oath of information given to him that the party acknowledged that he was served, hath been held ground for an attachment. But in case of appearance, every defendant must have particular notice of the suit, although at the first the party principal only were called, and he was enjoined to bring in his servants. But then many times oaths were made that he did his endeavour, and his servants wilfully departed from him; which, if he were bound in recognizance to produce them (as was most usual), did not dispense with the same. And more than that, it appears in *H.* 8.'s time, that one being bound to appear by recognizance, made himself to be arrested as he came, and imprisoned in the Compter, by reason whereof he could not appear at his day; and upon oath hereof he could not be discharged, but the time was referred to the king's counsel. But this is not to my purpose for appearing upon process; in which case delivery of the process to the wife

was

PART III. was held a good ſervice, and oath made of the parties, or any ſtander-by that ſaw the ſervice.

Now for excuſes for appearances, I find there be many that diſpenſe with this writ; as if the age of the defendant be above ſeventy years. So likewiſe impotency and ſickneſs; and ſuch an oath was allowed for one *Henry Hudſon* in 12. *H.* 7. being vicar of *St. Dunſtan*'s in the Weſt, within one mile of Weſtminſter: and the oath is held ſufficient in all theſe caſes, although the party extend it no farther than as he believeth in his conſcience. So likewiſe employment in the king's ſervice is a good cauſe, as appears by a letter written from the *earl of Surrey* to the lord chancellor; and about 10. *H.* 8. the vice-chancellor of Cambridge had ſuch an excuſe allowed unto him for being employed at the king's command. So likewiſe if the defendant ſhall make his oath, that he came not to his houſe till after the return of the proceſs, or had not notice till the return, his contempt ſhall be excuſed. But in theſe caſes he ſhall pay the fees of the attachment, becauſe it was awarded upon ſufficient grounds till the excuſe came. But if the attachment be awarded upon an inſufficient oath, it is doubtful whether the defendant ſhall pay the coſts of the proceſs: yet it ſeemeth that he ſhall, becauſe the awarding of the proceſs is the act of the court, and not of the party.

For affidavits for the ſervice of a *ſubpœna* to rejoin, or join in commiſſion, and to hear judgment, and how they ſhall be certified, I will declare in their proper places. But it is to be obſerved, that in all caſes where an affidavit is to be taken, it muſt never be retained to the merit of the cauſe, but in point of proſecution or contempt of the court; where alſo this privilege an affidavit hath, that whereas in other courts upon affidavit made of a contempt the offender ſhall be examined, unleſs his accuſers will prove the contempt againſt him; yet upon affidavit in this

court,

court, the party charged ſhall be committed without his confeſſion. The clerk's fee for entering the affidavit is two ſhillings and four-pence, and for the copy thereof (if it be required) two ſhillings.

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§. XIV. WHO MAY BE ADMITTED TO ATTORNEY.

AFTER anſwer and examination, in antient times, the defendant did then find ſureties to appear when he ſhould be commanded, and theſe were called *fidejuſſores* in the old records; and then, upon ſuit made to the lord chancellor, they were diſmiſſed to attend, which advantage to an attorney is a diſcharge to a perſonal attendance. But they were firſt bound to ſtand to the act of their attorney. So I find that one *White*, 10. *H.* 7. was bound in one hundred pounds, that the city of York ſhould ratify what *Stoodham* the attorney did, in the cauſe which *ſir James Danby* had againſt the city; but afterwards their agreement was only taken, and the admittance was by the lord chancellor entered in this form:

A. B. licentiatus recedere per dominum cancellarium comparare per attornatum A. S. et debet fidem de rato habituro, &c.

ABOUT 10. *H.* 8. the entry was, *A. B. admiſſus eſt per dominum cancellarium ad attornat. et conſtituit J. H. attornatum ſuum.*

BUT afterwards it grew uſual that it was ordered, that the defendant, upon his anſwer and examination, if he confeſſed nothing, ſhould be admitted to attorney.

AND in 16. *H.* 8. a general order was made, that if any were called up, and confeſſed not the matter, but traverſed it, they ſhould be admitted to attorney; which order hath ever been ſince continued; but that is now enlarged, for that as well thoſe which confeſs the offence as thoſe which deny it, are now of late admitted. But in the *lord*

PART III. *keeper Bacon*'s time there was an order, that thoſe which confeſſed any offence, the examiner was to certify that to the court; and upon his certificate, the court took order for the party's forthcoming. But of latter times, there is no ſuch credit or countenance given to the examiner's certificate; eſpecially ſince they have been under-clerks; and the entry is now, *A. B. ponit loco ſuo W. J. tam ad perdendum quàm ad lucrandum*; for which the defendant payeth to the clerk of the court.

AND he is thus admitted, either when he is examined, or if he attend four days, and no interrogatories put to examine him, then upon certificate from the examiners that there are no articles put in, he is admitted to attorney; and that is a licenſe for him to depart without any examination at all; yet may the court, upon motion afterwards, call him again to be examined. And of latter times the clerk of the court will ſend him word to come to be examined before his departure out of the town, the interrogatories coming in forthwith upon his admiſſion. But it ſeemeth that it is beyond his authority, for he is concluded by the act of the court once entered; and no man can alter it but the lord keeper or the court. And it muſt be underſtood, that as in the caſe of anſwer, ſo in the caſe of examining, the king's attorney is not tied to four days to put in interrogatories, but ſometimes the defendant attendeth ten days, or twenty days, and cannot be admitted but by conſent of the court. For the king's attorney may refuſe to put in his interrogatories to either of the examiners, and require ſome perſonages of honour or eminency to be appointed to take the examinations, as it was in the *Dutch* Caſe. But it may happen in ſome caſe that the plaintiff ſhall have longer time than four days to put in his interrogatories to the defendant. For if the complainant ſerve four perſons to anſwer upon one return, if one anſwer, and the reſt anſwer not till three days after, the plaintiff hath four days after the three have anſwered, to

to put in interrogatories to the fourth; but if he take out attachment againſt three, then muſt he put in interrogatories againſt the fourth upon the fourth day after the anſwer; and ſo it was ruled in *ſir Philip Tyrwhitt's* Caſe, *M.* 4. *Jac.* and the reaſon is, for that the plaintiff hath choſen whom he will examine firſt. Again, if the defendant will put in his anſwer the firſt day of a return, when he never had appeared till *quarto die poſt* (for the plaintiff hath no reaſon to attend him), then he is compelled to attend the court. In like manner if any ſtanding in contempt will ſecretly come in, and put in his anſwer before the return of the proceſs, he ſhall not be admitted to attorney in the four days, unleſs the plaintiff take notice of his appearance by accepting the fees of the attachment, and then he ought to put in his interrogatories. But if the defendant ſhall come to put in his anſwer in vacation-time, he ſhall not be admitted to attorney, unleſs his proceſs be made returnable in the vacation; then the plaintiff is tied to attendance, as well as the defendant.

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§. XV. OF THE PLAINTIFF'S AND DEFENDANT'S JOINING IN COMMISSION.

I HAVE touched before that anſwers are to be put in, either in the court or in the country, by commiſſion; and that the commiſſion is directed to four commiſſioners, who have power given them to ſwear the defendants to their anſwers, and to take their examinations. They were in antient times upon great advice ſelected by the court, the principal men of nobility, or great biſhops, abbots, or priors, living near the places; but of latter time, when the defendant maketh oath for his excuſe, or obtaineth favour from the lord keeper (whoſe great favour it is to give leave to anſwer the *dedimus, poteſtatem*), or when the attorney

PART III. consents to have a commission granted (which of late is very usual by reason of their profit, which the lord keeper yieldeth unto them as an advancement of the benefit of their places, but yet it was more beneficial when they had it by the mere favour of the lord chancellor or lord keeper, who gave them continual access unto them for that purpose; as the *lord Puckering* did, under whose hand I have seen, at the suit of an attorney, *dedimus potestatem* in favour granted in a day, upon short petitions exhibited unto him, subscribed only *fiat*), the order being obtained if it be of grace, or a rule entered if it be upon the validity of the affidavit of excuse, by the clerk of the court, the defendant giveth the plaintiff day to join in commission with him, and delivereth to his attorney six gentlemen of quality, all men without exception for indifferency, out of which the plaintiff chuseth any two to be commissioners; and then the plaintiff delivereth to his attorney six of equal condition, out of which the defendant chuseth two also: all these are mutually entered into either of the attornies books kept for the purpose, and the place of execution, and the time, which is mutually agreed upon (which is for the most part in equal distance), especially favouring the plaintiff and his commissioners ease; unless the plaintiff be decrepit, and then they may have a clause in the commission, that the commissioners shall go home to their houses *si commodè laborare non queant*; and either of the parties may require a day certain to be expressed in the commission for the execution thereof, if they please; otherwise it goeth upon fourteen days warning to be given by the one side to the other; which warning is oftentimes expressed in the commission to be left at a certain place, and the commission is awarded to four, three, or two, so that less than two cannot execute it.

If the plaintiff will not join with the defendant in the commission, he hath day given him to join; and if he do not, a second day is given him, that the defendant shall have it

it alone; and if by that time the plaintiff deliver not his commiſſioners names, and agree to the commiſſion, the ſame is awarded to four juſtices of peace next adjoining to the defendant's place of habitation, who are preſumed to be perſons of integrity and indifferency. But the court or the lord keeper may, if he pleaſe, appoint all the commiſſioners himſelf; there being no means to abridge his antient power.

THE commiſſioners being agreed upon, the defendant's attorney maketh tranſcript of the bill, and engroſſeth the ſame *de novo* in parchment. And then the clerk of the court maketh a warrant for the commiſſion to the proceſs-maker, who receiveth the ſame with tranſcript of the bill, and maketh the commiſſion, and includeth the bill therein, and carrieth it to the ſeal, the bill and writ being included within the broad ſeal, which muſt be delivered to the commiſſioners ſealed; the tenor whereof is in theſe words: *Jacobus, Dei gratiâ, &c. dilecto nobis A. B. C. et D. ſalutem: Sciatis quòd dedimus vobis præ tribus vel duobus veſtrum plenam poteſtatem et authoritatem accipiendum reſponſionem J. C. et R. T. ad petitionem W. B. quam verbis mittimus hiis præſentibus intercluſam, necnon examinandum prædictum J. C. et alios præfatos defendentes de et ſuper quibuſdam interr. ex parte W. B. coram vobis miniſtrandum; et ideo vobis mandamus apud H. 18. die Maii inſtantis congregatis, et ſic de die in diem donec compleveritis; proviſo ſemper quòd ſi J. L. et al. perſonaliter accedatis eiſdem deſuetum de et ſuper materiâ reſponſionis prædict. ac circumſtantiis ejuſdem tactis per eos prius coram vobis ſacroſtantis Dei evangeliis juramentum corporale miniſtratis; ac ipſius defendentes et ſuper interr. prædicta ſacramenta ſua diligenter examinatis examinationeſque ſuas recipiatis, et inſcriptas in pargumeno redigatis; et cum eos ſic ceperitis, nos inde et conſilium noſtrum apud Weſtmonaſterium de toto facto vero in hâc parte necnon de nomine attornatum ipſorum*

PART III. *defendentes ad lucrandum vel perdendum in præmissis in Oct. Sanct. Trin. proxim. futur. sub sigillis omn. distincte et aperte certificetis, absque copiis partibus inde reddendis, remittendis nobis petitionem et interr. prædicta unà cum hoc breve. Teste meipso, &c.*

WHICH kind of petition is many times awarded to one of the examiners of the court, who executeth it alone. But because the commissioners are named, two of the one party and two of the other, some question hath been, Whether if, by default of the writing of a clerk, one commissioner's name be mistaken, by reason whereof he hath no authority to execute the same, and the other of that name cannot or will not come to the place, whether then the examination taken by the commissioner's names by the one part shall be received and allowed? And it hath been justly by the lord chancellor Ellesmere held, that any two of the commissioners should execute the same, and shall be held indifferent howsoever named by one party; for they are the king's commissioners, and not the parties. And the difference was taken between commissioners and arbitrators: the latter having authority from the parties are not intended indifferent, unless they be of both parts to make the award; but the commissioners being commanded by the king ought (and is intended that they will) to perform their duties; and therefore no exception can justly be taken unto them, if there do no practice appear to the court.

THE answer being engrossed in parchment is brought to the commissioners; which may be received without the hand of any counsel, for that it is presumed in remote parts men are *inops consilii*; which the commissioners ought to read before they minister the oath; for if it be a demurrer, or a plea in bar, it is said, that they have no authority by the commission to receive it, unless there be an express order of the court that they shall take it. As a proof thereof, there be many orders to authorise them to

to that purpofe. But if it be an anfwer with the oath taken, and which is miniftered in the fame manner as is before rehearfed, they except.

AND although it be faid in the commiffion *abfq. copiis partibus inde reddendis*, yet the commiffion being to examine the defendants upon interrogatories to be miniftered by the plaintiff upon his anfwer, the commiffioners muft fuffer the plaintiff and his counfel to take a view of his anfwer in their prefence, and to take confideration thereupon to minifter interrogatories in due time to examine the defendants; but if the plaintiff or his counfel fhall not require the fame, nor minifter any interrogatories, then are the defendants to be difcharged of examination; but the writing and engroffing of thefe examinations is to be wholly at the defendant's charge, it being for their eafe; but the commiffioners' charge is to be equally borne, if chofen, by both parties: but if the plaintiff fhall attend the time, and the defendant fhall not appear, and bring the commiffioners (for they have always the carriage thereof, it being awarded in their favour), then, upon a certificate of the plaintiff's commiffioners of their attendance, the plaintiff hath his cofts taxed by the clerk of the court according to the quality and conditions of the parties; and upon return of the commiffion, if by that time the defendants put not in their anfwers in perfon, an attachment is awarded againft them for not returning their anfwers by the commiffion. But if one defendant fhall fue forth a commiffion for divers, which were never ferved with procefs, and without their privity, upon the return thereof, an attachment fhall be awarded of courfe; but upon the oath of excufe, all thofe which had no notice fhall be difcharged of contempt; but the plaintiff fhall be fatisfied his cofts, for that he had a good ground for the profecuting the contempt, and the defendant muft move the court againft their fellow-defendants. But it is a general rule, that no man, without fpecial favour, can in ordinary courfe have

PART III. have a commiſſion which is under contempt; no, not if he have anſwered inſufficiently, and the ſame was overruled, it being a kind of contempt, he is to ſatisfy the court in perſon.

THE examinations being taken and engroſſed in parchment, they are to be returned up by the commiſſioners, or ſome from them, under their ſeals, upon oath that the ſame is not altered. And if the defendant be examined upon the view of any writing or deed, the ſame is to be returned included, and ſafely to be kept by the clerk of the court. For if the plaintiff which examineth any one upon any ſuch writing, which is called an *exhibit*, if the ſame ſhall be taken away by him, and does not remain as upon record, either with the examiner if the party be examined in court, or delivered to the commiſſioners and by them returned into the court, no uſe can be after made of that upon hearing; as it was adjudged by his majeſty and the judges in the *counteſs of Exeter*'s Caſe; and the reaſon was, for that the thing exhibited is by the examination incorporated into the defendant's anſwer, and made parcel thereof; which if his adverſary ſhould keep in his cuſtody, he might pervert and alter at his pleaſure, which were unjuſt. But if the commiſſioners ſhall not certify the examinations, or if the ſame ſhall be loſt in carriage, a *certiorari* ſhall be directed unto them, to certify the ſame out of their firſt papers, as it was held in *Large*'s Caſe.

IF the plaintiff or defendant ſhall cauſe one another to be arreſted, going, coming, or at the execution of his commiſſion, he which cauſeth the ſame ſhall be committed. Or if they ſhall unreverently behave themſelves before the commiſſioners, or to the commiſſioners, if any ſtranger ſhall behave himſelf unreverently to the commiſſioners, or any of the commiſſioners in the cauſe, an attachment ſhall be awarded againſt them, and they examined thereof; and if they confeſs the ſame, or if the ſame be proved againſt them,

them, they ſhall be committed. And if any of the commiſſioners or parties ſhall be arreſted attending this commiſſion, they ſhall have a writ of privilege to diſcharge the action.

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§. XVI. OF INSERTING NAMES INTO THE BILL.

It was a great grievance, that men exhibited their complaints, and, under pretence that the plaintiff could not be drawn to anſwer, ſued out proceſs, and continued the ſame at their pleaſure, and ſo delayed the defendants, after they had driven them to a chargeable attendance for examination upon interrogatories; and ſometimes colourably inſerted names of other defendants, at their pleaſure: all which delays were not to be helped without motion in open court, which could not eaſily be obtained. Whereupon the court in Eaſter Term 38. *Eliz.* did order, that every plaintiff ſhould do his beſt endeavour to ſerve all the defendants named in the bill, ſo as they might appear the next Term following after the exhibiting of the bill, at the fartheſt; and that no plaintiff having ſerved one of the defendants named in the bill with proceſs, ſhould have any *ſubpœna* upon the ſame bill againſt any other of the defendants to anſwer, after one term paſſed after the exhibiting of his bill, unleſs the plaintiff took out new proceſs againſt ſuch defendants upon the exhibiting of his bill, and made affidavit that he did his beſt endeavour to cauſe the ſame to be ſerved, and could not ſerve the ſame; and if he did otherwiſe, the defendants which were ſerved, and had anſwered, might ſeek their diſmiſſion, as if new proceſs had been ſued out.

And it was further ordered, that every proceſs ſhould be ſued out in ten days after the filing of the bill; and not any time after upon that bill, in caſe proceſs were not

ſued

 ſued out before the bill filed, which was then held unlawful. And it was alſo ordered, that no plaintiff in this court ſhould, after proceſs ſued out upon his bill, add any more names of defendants to the ſame without the ſpecial warrant of the lord keeper.

But the court finding this order ſomething too ſharp for the proſecutor, who was ever intended to be favoured, and that by reaſon thereof the court decayed much within four years, the *lord keeper Egerton* calling the judges unto him reformed thoſe orders; and did then order, that the plaintiff ſhould have liberty by the ſpace of a whole term next after the bill exhibited, to ſue for any proceſs upon the ſame bill, or to inſert any name of defendant thereunto, and ſhould likewiſe be permitted to renew any proceſs by the ſpace of two whole terms next after the bill exhibited, and that without any affidavit, any former order to the contrary notwithſtanding; which latter order hath received a continued allowance, and been held very behoveful to the ſubjects, and honourable to the court, for the ſpace of twenty-two years. And if any perſon be ſtraitened, for that by ſome latter diſcovery other defendants names came to light after the time limited, or in the like caſe, he may repair to the lord keeper, who hath power to order any particular caſe, notwithſtanding the general rules, upon good matter ſhewed unto him. And theſe rules extended not to the king's attorney, but he hath the antient liberty without any reſtraint, and the party grieved can only fly to the court by motion, if by his indifferent power he be preſſed further than is convenient. And it is worthy of obſervation that, in antient times, it was uſual, that upon the hearing of a cauſe, many other offenders were diſcovered, and they always ordered to be called upon and puniſhed by a ſecond day of hearing; and ſince the courſe of inſerting names and continuances of proceſs, it is rarely ſeen but all the defendants are diſcovered upon examination of the firſt, and ſo called in, and orderly proceeded

ceeded in together at one time; so that in thirty years no cause was a distinct cause to every defendant, and no joint offence, as is usual in that court of riots and other offences: neither is it necessary for the plaintiff in his bill to desire that he may insert their names when they be discovered, although it be very useful, for he may do it although it be not inserted by the bill, as it was adjudged in ——'s Case.

§. XVII. OF REPLICATION.

AFTER all the defendants are examined upon interrogatories, and have answered, in the next place the plaintiff is to reply; which replication put in, the plaintiff must content himself with the answer and examination, for he cannot then go back, for that he hath admitted it as sufficient, although it be very imperfect. But in some cases there needeth no replication. The one is, when the defendant by answer or examination confesseth the offence, so thereupon the plaintiff may go to hearing upon his own confession; but of that I shall speak when I come to treat of hearing: the other is, when the defendant pleadeth, generally, not guilty, whereby an issue is joined, so that there needeth no replication. But process may be sued out *ad rejungendum in commissione*, and thereupon witnesses be examined, and proceeded to hearing; but in such case the plaintiff doth reply. The same is a prosecution which shall keep his cause from dismission, as it hath been held.

IN antient times, the plaintiff replied the same Term he preferred his bill, and the defendant rejoined then also; but afterwards the plaintiff falling to dally with the court, in *Hil*, 2. *Eliz.* the *lord keeper Bacon* made an order, that in all those cases wherein an answer was put in Michaelmas Term before, if the plaintiff did not reply by the first

PART III. first day of Easter Term then following, the cause should be dismissed; whereupon in Easter Term 38. *Eliz.* that course was settled as an order, that if the plaintiff should suffer the whole next term after answer to pass without replication, and should not reply on the first day of the term then next ensuing, then the cause to be dismissed with costs.

BUT that order by the *lord Egerton*'s late orders of reformation in 42. *Eliz.* was continued only as it was supplied, that upon not guilty pleaded whereas no replication was needful, the plaintiff should reply within seven days of the beginning of the second term after answer put in; but the defendant upon these orders catching an advantage of dismission, the *lord Egerton* did for indifferency at all hands order, that in the second Term the defendant should give the plaintiff a week to reply, or otherwise to prosecute, or in default thereof to be dismissed; which order standeth in use to this day, and is of great justice and indifferency.

BUT I have shewed, that in some former times the plaintiff did not seek the defendant by process, but he gave his continual attendance, and he was bound by the warning given to his attorney; but that was many times when the defendant's own servant was his attorney; but since they were settled officers which always attend the court, warning was given in all cases to the party by process, where his attendance was necessary, as in this case, to join the issue in the cause, whereupon witnesses are to be examined for this offence: but by reason that it was but a notice that is required, therefore the serving of any one defendant is a warning to them all; and therefore, if one be served, and he take notice thereof, and join the issue, and in commission, and the plaintiff examineth his witnesses, and the same are published, the cause shall as well proceed to hearing, as if all had been served; except it shall appear that there was collusion betwixt that one defendant

fendant and the plaintiff, as in the Case of *Wombwell* against *Wombwell*, 30. *Eliz.*; or else, that the defendants stand charged with several and distinct offences, as it was in the *Dutch* Case; in which cases the defendant shall have a new serving to rejoin.

The replication itself is but the avoidance or denial of the answer and maintenance of the bill, to draw the matter to direct issue, which may be proved or disproved by testimony; but if any thing be omitted out of the bill material to charge the defendant, although it be alledged by way of replication, it is not pertinent, nor shall any defendant be convicted thereupon; by reason whereof there is so little regard of the replication, as that they are only drawn by clerks, without any regard whether there be any issue joined in the case or not, no counsel being made privy or acquainted therewith; insomuch as if many causes were well looked into when they come to hearing, the parties would be found not to have joined any issue; which happeneth by reason that the replications be received without any counsel's hand or perusal, but the same being engrossed is brought under the plaintiff's attorney's hands; which is done for this reason, for that he thereby chargeth himself to answer the clerk of the court for the copies of all the defendant's answers, for that the plaintiff cannot by course of the court reply until he hath taken the copies, and paid for them; and the replication being filed, the clerk of the court maketh a warrant to the process-maker to make a *subpœna* for the defendant to rejoin, for which warrant he receiveth only two shillings, and then the writ is sealed, containing no other form than the usual *subpœna* to appear, but the same is indorsed *ad rejungendum replicationi J. S.* at the return whereof the defendant appears, and takes a copy of the replication, and puts in a rejoinder. And the pleadings have, in antient times, proceeded to the surrejoinder and rebutter; but, as I have said, of latter times those are wholly out of use, by reason that the

 the clerks only direct all these pleadings, without the advice or subscription of any counsel. The defendants do then join in commission, and proceed to the examination of witnesses.

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§. XVIII. OF TAKING RECOGNIZANCE.

But before I proceed to entreat thereof, there are usual things which do not hasten the hearing of the cause, but are, as it were, in the bye in most cases, and do not tend to conclude the cause, but either to prevent mischief, or prepare the cause towards the hearing. And I find that the same consisteth in three several points—taking of a *recognizance*, the awarding of the *subpœna duiens tecum*, and *injunctions*; all which I handle in this place, for that for the most part they are awarded after the time of the examination.

And first for *recognizance*. I observed before, that in antient times the defendants, upon their answer, did always bring *manucaptores*, or *fidejussores*, which gave recognizance to the court, that they should appear *de die in diem*, and sometimes abide the order of the court; that they should appear at the hearing, and always to commit no outrage. But of latter times the same is not of use; but now recognizances which are taken are either to appear at the hearing, which is very useful, or to keep the peace, or sometimes to be of good behaviour. As for recognizances to appear at the hearing, or any such like, by latter orders of reformation the clerk of the court may take the fees but for one recognizance, although there be many defendants; but the same is usually entered into upon any confession of the matter by any of the defendants; and at the hearing of the cause the party is called upon his recognizance, and if he make default, the same is recorded, and the recognizance is estreated in the exchequer for the king's benefit.

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In the time of H. 7. and H. 8. when great persons were called by process, or when suits were betwixt the abbot and convent, or corporations, they were first bound on both parts to keep the peace, and to commit no outrage; sometimes men were bound to wear no weapons; and in all these cases recognizances were taken of them in great sums of money, and always before the lord chancellor or the court; yea sometimes the court hath awarded special *supplicavit*; and after that time, if there were suspicion of outrage betwixt the parties, in 6. *Eliz.* both plaintiff and defendant, *viz. Cardinal* and *Christmas*, were bound to the good behaviour; but more commonly of latter times recognizances for the peace. *Sir John Stafford ad sectam Townshend*, 4. *Jac.* was bound to the peace, upon oath that he used to break the peace, and that the plaintiff was hurt by an unknown person; and the condition of his recognizance stretched for his servants and followers as well as himself. But of late times justices of peace are trusted with such recognizances, and the court leaveth it to them; but surely the recognizances to this court breed a more awful respect than those taken by inferior men in the country; so that of late there are not any recognizances but for appearance of defendants at the day of hearing of the cause, and from the plaintiff, if he prove not his complaint against the defendant; the latter of which was never used in former times, and not to be used often but upon just ground and certain information.

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§. XIX. OF SUBPOENA DUCENS TECUM.

It is likewise very usual, that the court awardeth process of *subpœna ducens tecum* against any defendant, or any other, to bring into the court any writings, deeds, or evidences, which may conduce to manifest the truth of the matter

PART III. matter in question. So I find that in *H.* 8.'s time, process *ducens tecum* was awarded to the mayor and commonalty of York to bring in charters; and in the same king's time the inhabitants of Denbighshire, Merionethshire, and Carnarvonshire were ordered to bring in all charters granted to them by *H.* 7. which they trusted in the hands of an honourable person of the presence to keep for them indifferently; but the deeds and evidences were usually ordered to be brought in almost in every case. But of latter times the court granted no *ducens tecum* in ordinary course, unless the writing be charged in the bill to be false, forged, and fraudulent, and confessed by the defendant to be in his custody: and in such case, if it be both charged in the bill to be false, forged, and fraudulent, and confessed in the answer or examination, the clerk of the court awardeth *ducens tecum* of course.

BUT if there do appear to the court that there is any writing in the defendant's custody, or that of any other's, which will manifest the truth, the court upon motion, or the lord keeper, may award a *subpœna ducens tecum* to bring the same in. So in the reign of queen *Elizabeth* certain persons were questioned for engrossing of corn; and being interrogated to whom they sold the same, one of them answered, he could not tell without view of his books which he kept for his trading; whereupon the *lord Egerton* awarded a *subpœna ducens tecum* to compel him to bring his books into the court, of which the other party had view to discover the truth. So in *sir* ——— *Manning*'s Case, who was charged with corruption in the place of chancellor to the *lord bishop of Exeter*, and giving sentence corruptly, and without good ground, for bribes, in his examination he referred himself in all this to the acts of his court remaining with his register; whereupon the lord chancellor, being moved, awarded a *ducens tecum* to one *Michaells*, the bishop's register, to bring into the court all the acts of the said chancellor's court, to inform

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this court of the truth at the hearing of the cause. And of late time one *French* was, and so is questioned for notable deceits in divers counties, in collecting of great sums of money in the county under colour of gathering his majesty's rents of his honour of *Tickhill*, parcel of the *Dutchy of Lancaster*; whereas the inhabitants of the places where he made his collection, owed neither suit nor service nor rent belonging to his majesty or that honour; nay, some of them held no land at all of the king, nor of any other person. And for the discovery thereof being examined, whether he had not levied several sums of money of divers persons named in the interrogatories, and what those sums were, he made answer, that he could not set down the same without view of his book and writings in the country; and being ordered to answer better, gave the same answer again; which giveth just occasion to force him to bring in his book upon the *subpœna* served, which is the same in effect with the other *subpœna*, but that the clause of *ducens tecum* is contained in it.

If the party appear not upon affidavit made of the serving of it, an attachment is awarded against him; and upon his apprehension he is committed until he will bring the same into the court. But if he cannot make oath that the same was not in his custody at the time when he was served with the process, but delivered to another person, he may be excused; and the person whom he voucheth shall then be called by process to bring in the same into the court, unless it shall appear that the same is thrust from hand to hand cautelously to defeat or abuse the court; and in such case the court doth often attach them all, and order them to be examined upon interrogatories to discover the truth; and if it be found that they have cautelously agreed to abuse the court, the court punisheth them all, as well parties as strangers: but otherwise bonds and deeds questioned to be forged are usually brought into the court, and remain till the hearing; the view of the

deed many times giving great light to discover the forgery; as in *Whitaker*'s Case, where the *lord Popham* discovered the forgery by view of the *lord Monteagle*'s seal (being an horse), from whom the lease in question was pretended to be made.

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§. XX. OF INJUNCTIONS.

THERE followeth in the next place the writ of Injunction, which is granted as a protection to defend the plaintiff from the desperate malice of the defendant's device which he compasseth against him by fraud and falsehood. As if the bill be preferred against the defendant for forging an obligation, and after he is questioned, to gain some countenance to his false deed, he will attempt some suit in the common law upon it, the court will in this case grant an injunction to stay the suit: and in antient time the court began every case with an injunction, to settle the possession in peace until the cause were determined; of which there are not so few as one thousand precedents. But when the court perceived that men did thrust suits into this court after they had unlawfully got into possession, thereby to strengthen a bad title by some feigned suggestion, the court hath forborne to meddle with the settling of possessions, except in case where the defendant, upon examination, confesseth that he hath got the possession from the plaintiff by fraud, force, or outrage, or by pretext of some forged deed, or by perjury; in all which cases the court hath used, upon confession, to settle possession. So likewise it hath been usual, that if complaint be made upon the stat. 4. & 5. *Philip & Mary* for procuring of unlawful contracts of women under sixteen, to stay the proof of any contract in the ecclesiastical court till the cause

cause be heard, if any undue practice be confessed. And I find that long before that statute, *viz.* 11. *H.* 7. in a Case between *Cromer* and *Hudson*, *Cromer* was enjoined to bring in one *Sharp*'s daughter, whom he had unduly withdrawn from her father, and to deliver her in court uncontracted; and then the court will sequester the person, as it was done in *Barron* and *Dennis*'s Case. And this is done upon great consideration: for if offenders should have the right of their pretences concluded for them by strictness of law before their offences come to judgment, they would be careless of the punishment, for that they had first obtained their wilful desires. And if a man should be suffered to recover a great sum of money upon a forged bond, and take an innocent man in execution, and keep him in prison, or take his goods or lands in execution, many desperate persons would be encouraged to commit forgery; as one *Spye* did in 4. *Eliz.* where the matter did not appear till after the judgment at law; and then, although it were plainly discovered, the judges made dainty to dispense with the judgment in law, unless the wicked forgerer would deliver the wronged person by his consent; which because he would not, the innocent and the forgerer both continued in prison.

But, as I said before, the leading rule in these cases hath been the priority in suit, and that the court is not tied thereunto; for if a suit should be commenced at common law which will directly prejudicate the sentence of this court in a matter in issue, the court will usually stay the suit by injunction, as being presumptuous to check with this high court.

But in these cases the great judgment of the court is most exercised. For if a man have preferred a bill of perjury, and after call the defendant perjured, it hath been thought inconvenient to stay the action of the case brought for these scandalous words, for that men may file a bill to protect their scandalous words. But if a man will call

PART III. another perjured, and after prefer a bill for the perjury, there it ſhall be intended that that bill is preferred of purpoſe to excuſe the ſcandal, and therefore no injunction to be granted in the caſe; as it was adjudged in *Cliff* and *Jennings'* Caſe, *M.* 4. *Jac.*

But in *H.* 7. and *H.* 8.'s time, this court did always enjoin the ſtay of all other courts until they give leave concerning the title any way in queſtion in this court, not ſuffering any of the parties to commence any action real or perſonal. As in 7. *H.* 8. there was injunction, *quòd non ulterius proſequatur vel proſequi ſinat aut faciat aliquam actionem verſus Grinſtree et al. ſeu aliquam actionem com. leg. cauſæ litis his inter eos pendent.* where the court went to all cauſes, although not concerning the matter in queſtion; and the precedents are many of that nature.

Yet in *ſir* —— *Egerton*'s Caſe the ſame was queſtioned; but after long debate that cauſe was reſolved more to the honour and dignity of this court than any caſe within forty years before; for there was determined, that any man which ſtood out in contempt of this court might be enjoined not to bring any ſuit in any other court whilſt he ſtood in contempt; wherein the court did make this court equal to the other courts of common law, where the perſon is diſabled by outlawry, which is but a contempt of the court.

It was very much in uſe in the *lord Egerton*'s time, when there were many queſtions concerning the undue contriving of wills, to ſtay the probate of wills until the cauſe were heard; but that was where ſome pregnant matter appeared to induce the court to ſuſpect ſome ill courſes in contriving the will: for if injunctions ſhould not be granted, it were in vain for the party grieved to ſue; for perhaps in ſtrictneſs of law the will may be a will not forged, and yet framed and made when the party had no diſpoſing memory; as it was in *Tunſtall* and *Brackenburie*'s Caſe, which was by the ſentence of this court damned.

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And so *sir Randall Brereton*'s will, and many others. And this likewise maketh all courts to tune together; for if the ecclesiastical court should give sentence for the will, and this court should damn the will, this would make no good harmony in the justice of the Commonwealth.

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§. XXI. OF THE EXAMINATION OF WITNESSES.

THE defendant having answered, and being perfectly examined, and being bound either to attend the court or to be present at the hearing of the cause, the deed in question being brought into the court, or other evidence which may manifest the truth, and foreign suits stayed which may prejudice the judgment of this court, it is fit time to examine witnesses to prove or disprove the matter in issue: and those are examined either in court by the examiner, or by commission in the country. And for examinations in court, there hath been some question, whether they might be taken before the plaintiff's replication, or before the defendant's answer; for if upon a bill exhibited the defendant should stand in contempt, and the plaintiff's witnesses should be aged or sick, it were hard that the plaintiff should lose his suit by reason that he cannot bring in the defendant to answer, which he must do unless he may examine his witnesses during their lives to prove the matter.

YET I conceive in ordinary course, without the perpetual order of the lord keeper or the court, he cannot examine them; and my reason is, for that I find a Case *Pas.* 34. *Eliz.* betwixt *sir John Devers* v. *Thasborne*, the defendant obtained a day to answer by reason of the length of the bill, but it was provided that the plaintiff should have liberty to examine witnesses; and the defendant took no exception for that they were examined before answer;

PART III. whereby I collect, that it was held good at that time to the examination if they were taken before anſwer. And the Caſe of *ſir Richard Champernowne* againſt *Wakeman* and others, about the *earl of Devonſhire's* will, it was, after much queſtion, clearly reſolved, that after anſwer witneſſes might freely be examined at all times, as well for the defendant as for the plaintiff. And as they may be examined in court before any commiſſion be awarded for that purpoſe, ſo may they alſo after the commiſſion has concluded: and one great privilege is granted to examination in court, that the party may exhibit as many and as divers interrogatories as they will, which they cannot do by commiſſion, as I ſhall ſhew hereafter.

Now concerning the perſons of witneſſes examined in court, it is a great imputation to our Engliſh courts, that witneſſes are privately produced, and how baſe or ſimple ſoever they be, although they be teſted *diabolares*, yet they make as good a ſound, being read out of paper, as the beſt; yea although a lewd and beggarly fellow take upon him the name and perſon of an honeſt man, and be privately examined, this may be eaſily overpaſſed, not eaſily found out; whereas in eccleſiaſtical courts the witneſſes muſt be ſworn in court in preſence of the proctor of the other ſide at leaſt. But to prevent theſe inconveniences, the *lord chancellor Egerton* took an order, that every witneſs which was examined in court ſhould be ſhewed to the attorney of the other ſide, and his name and place of abode delivered, to the end that he might be known to be the ſame perſon, and that the other ſide might examine him alſo if they pleaſe.

But it is as much wondered, that this court ſuffereth not the parties to examine the credit of witneſſes, to notify to the court what their condition is, for that in the eccleſiaſtical courts they have liberty at ſeveral times to produce witneſſes one after another to manifeſt the credit of witneſſes which have been produced; whereof is this rule,

Teſtes in teſtes et in hos ſed non datur ultra;

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in which course they examine their fame or disgrace in their whole lives. And the reason why it is not given way unto in this court is, for that causes being for the king, if witnesses lives should be so ripped up, no man would willingly be produced to testify; and therefore many opinions and circuits of judges are extant in this court, where it is adjudged that a witness deposing for the king upon an indictment shall not be questioned for perjury; yea this court hath ordered a great reward to witnesses in this court by yielding their testimonies for the king, as it was in the king's attorney's Case against *Dunnings*, *Mich.* 4. *Jac.*

YET let it not be conceived by any but that the court will allow exceptions to be taken to witnesses, and their credits to be examined, so that the parties cometh and moves it in court, to the end that the other side may take notice to examine witnesses to uphold their credit, for that many times *meretrix* may be *testi idonea* of matter done *in lupanario*; and of lewd offences the best men are not always the witnesses. Neither is this any new-invented order, to move the court upon exception to testimony; for in 7. *H.* 8. the exceptions against the witnesses exhibited in the party of the *duke of Buckingham* and —— *Ap Morgan* were committed to the master of the rolls and doctor *Taylor*; so that then the court was more curious, for they suffered them not to proceed to proof, except they conceived their exceptions pertinent; and now the liberty is not denied but in the Dutch cause, wherein are many precedents tending to the overthrow of the antient courses.

BUT this is a firm and constant rule, as well in this court as in all laws, that no man shall be received to except against a witness as incompetent, if he examine him also himself: but of these things I shall speak more particularly, only I was led hereunto by order of shewing forth the witnesses produced in court.

EXAMI-

PART III.

EXAMINATION of witnesses by commission, is always by men of great worth in the county where the fact ariseth, and were antiently appointed by the court the most eminent men in the county; but of latter times they are chosen by the parties, in the same manner as they are for taking their answers and examinations of defendants; and the commission differeth not much: for the *lord chancellor Egerton* understanding that when commissions were in execution, both parties attendeth with their counsel, and when they suspected a proof made against them, or many times understood by their commissioners, they always drew new interrogatories to cross that proof, which he conceived to occasion much perjury; he therefore made an order, that in all commissions which went forth for the examination of witnesses, they should include all their interrogatories, and the commission should go to examine *super interrogat. inclusis*, and not *ministrand.* Nay, if commissions be in part executed, they cannot add to nor alter any of those interrogatories, but they must still be the same, except it be by the special order of the lord keeper, or of the court.

AND this is held not to be equal and just, for that a man may understand that proof is made against him of something that he is not able to manifest to be apparently false, unless he had articles to examine the same, or could deem beforehand thereof it being false, which no man will presume will be done; and by this order truth will be concealed, and the party innocent extremely prejudiced. But this hath its answer; for the party in jeopardy hath liberty to minister any new interrogatories in court to produce witnesses upon, and so free himself of all great peril, although it be very chargeable unto him; but when there was liberty to minister new interrogatories in the country, the charge was treble, by the long sitting of the commissioners and extraordinary length of books.

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In time and place the plaintiff is always to be favoured, for the proof resteth upon him, and he sueth for the king; but if he shall have carriage of a commission, and a time and place appointed for the execution, if he shall not bring the commission to the place, and the defendant and his commissioners shall attend at the place, he shall bear their charges; and the defendant, for prevention of such loss, may have a duplicate, which is another commission word for word, or may have a day certain for the execution, to avoid the danger of loss.

And at the execution of this commission, the commissioners must behave themselves reverently and respectively one to the other, without any terms of provocation to the breach of the peace; so must the parties and witnesses and every stranger, so that there be no disturbance of the execution thereof; and if it be otherwise, upon certificate of oath thereof, the court will punish them for their contempt.

The witnesses which be produced at this commission cannot be refused by the commissioners, except that it appear unto them that they be parties to the suit, or be ideots, or *non sanæ memoriæ*; for other exceptions they cannot allow: but their commission being to examine *quoscunque testes*, they know that a party is no witness; and therefore they may refuse to examine a party, or a man that hath no discretion to declare his testimony: and the commissioners' duty doth most particularly appear in *Peacocke*'s Case, where it was adjudged, that it was a great abuse in a commissioner to tie the witnesse to the letter of his article, not suffering him to express the whole truth; which agreeth with the rules of the civil law.

And in that Case of *Peacocke* it was also agreed, that it is not lawful for the commissioners to discover to the parties for whom they are chosen, any matter which any witness hath deposed before them; nor to have conference with the parties, to take any new directions or instructions,

PART III. instructions, after they have entered to take the depositions of the witnesses.

AND one thing is much expected both of commissioners and examiners, that they set down the depositions justly; not to say he deposeth affirmatively or negatively, for it is held no deposition in this court. The place where they examine ought to be private for that purpose, that parties and witnesses may not hear the several examinations of every witness; and they are to take the depositions of the witnesses, and not to receive their testimony written; and all things that tend to secrecy and indifferency, that is a commissioner's duty.

The depositions being taken by themselves (for it is to be observed, that they have no authority to take the same by their clerks; and the *lord Egerton* was wont to say, that none of them was too good to be the king's clerks), the same is then to be ingrossed in their presence, and certified under their seals which were present at the execution, unless some will yield reason to the court why he did not join in the certificate; and then it ought to be returned into the court, as a commission to take the defendant's answer; but being returned to the clerk of the court, and for the most part it is to remain sealed until the cause be published, then it is to be delivered to the attornies to be copied for the clients.

AND if the commissioners have any way unduly behaved themselves in taking or partial setting-down the examinations, or ill-handling of witnesses to draw them from the truth, the party grieved shall have redress before publication: he speaketh afterwards to have redress by suppressing of the testimonies so taken, but the court may punish the abuse.

BUT examining of one witness twice, which is unlawful, or any matter of scandal impertinent to the cause, either against parties or witnesses, without the license of the court, that is to be moved after publication, for that it

it cannot be had and known till the copies be had and viewed.

BUT because the producing of witnesses is general both to the examination in court and by commission, I think it best to handle these general heads as extending to both kinds of examination.

FIRST, Who shall be received for a witness?

SECONDLY, How they shall be produced.

THIRDLY, What course may be taken to draw truth from him, and what he is to depose.

FOR the first, it is clear that a party can be no witness; and therefore if a bill be put in against many, and some called to answer, the other cannot be witnesses because they are named parties; and so it was done in *serjeant Hale's* Case: but by order of the court, where the defendant complaineth of his prejudice, and prayeth liberty to examine them, they are exempted from being parties. But the court hath lately taken an honourable order to allow the answer and examining of any persons named defendants against whom there is no proof, but only their names put in to take away their testimonies, which is grown exceedingly common.

AND therefore the wife cannot be allowed a witness against her husband who is plaintiff and defendant, for that they are but one person in the eye of the law; and so it was adjudged in the bishop of *Saint David's* Case, and in *Furebrand's* Case against *Shelliebrand*. But if the defendant's wife be percepted and examined against her husband, and the husband cross-examineth also, so she is examined on both sides, they both have allowed her, and she shall be allowed of; as in *John Rowe's* Case, 3. *Car.*

THE son may be a witness for the father; but, as the *lord Egerton* said, it must be in case where there were no other witnesses, for otherwise he would have small faith unto him.

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PART III. THE servants are good witnesses for their masters in case of riot where they are wounded, and yet are grieved parties, and shall best testify their own wounds; for it is intended that they are most likely to know the injury done against their masters, and their oaths shall be allowed in *odium spoliationis*; as upon the statute of *Winchester*, the party's own oath which is robbed is taken for the money which he lost, but the court will not task them damages upon their own oaths, except there be some concurring testimony.

I HAVE known outlawed and excommunicate persons disallowed for witnesses, and convicted felons; but I know not what authority commissioners have to refuse them, or how they can take notice of their conviction; but they are to leave them to the court, who will disallow them at the hearing if they see cause.

AN infant cannot be received for a witness unless he be above the years of discretion; and the civilians rule is, that *testis non admit. in criminalib. nisi sit vigint. annor.*; but I know witnesses examined of the age of seventeen years I allowed in this court, especially in cases of force.

So any man which hath been legally convicted *de crimine falsi*, as forgery and perjury, cannot be received to give testimony.

AND for the conditions of men which may yield testimony, the king may yield a testimony in any cause; for so did king *James* in many things in the *countess of Exeter*'s cause; and did in chancery by his letters under his signet in the *lord Auberville*'s cause.

THE great judges of the realm may yield testimony, but they do that by certificate under their hands, if not by oath; but upon their bare certificate divers men have been sentenced; as jurors, which have been bound over by the judge of assise for acquitting of offenders contrary to their evidence, have been sentenced upon the judges' certificate before whom the acquittal was; but that was only where

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they were authorised under the broad ſeal to take their verdict, for otherwiſe I conceive not that any man ſhould be puniſhed under a certificate without oath.

THE peers and nobles of the realm have been often witneſſes in this court; but they ſay they ought not to be ſworn to yield their teſtimony, but to deliver it upon their honour; a queſtion that I will not diſpute, but the preſent current is againſt it, only I have delivered my obſervation. Where they be charged as delinquent, *alieni*, if ſtrangers ſhall be witneſſes, if they cannot ſpeak the Engliſh tongue, there ſhall be an interpreter ſworn truly to expreſs their ſaying; but a Turk and Pagan cannot be a witneſs, for that he denieth the Holy Goſpel, whereupon they are to take their oaths.

THIS ſhall ſuffice concerning the firſt point, Who ſhall be received to be a witneſs? In the next place I ſhall ſhew how the witneſs ſhould be produced. And for that, it is certain that any man may come to yield his teſtimony without compulſion; and howſoever he be now eſteemed a forward witneſs which doth ſo, yet in former ſincere times it was much uſed, and no proceſs was ever awarded to compel them to be examined, unleſs the party that deſired to produce them will depoſe that he took them for material witneſſes. But of latter times every man may have a proceſs of *ſubpœna* to teſtify: but if the party which ſerved the proceſs do not tender the party ſerved his reaſonable charges, he is not compelled to appear. The coſts being tendered he muſt appear, or elſe an attachment is awarded againſt him, and all other proceſs, as againſt a contemner: and the witneſs may appear although coſts were not tendered; and upon his appearance and examination the clerk of the court may tax ſuch coſts as he ſhall think fit for his travel and expence. It is a uſual courſe, by reaſon that the commiſſion gives authority (*teſtes*), for the commiſſioners to make a precept directed to the witneſſes, commanding them to appear before them at a day and place

PART III. place appointed; and it was held, that if the witnesses refused to make their appearance to be examined before the commissioners by virtue of their precept, that then they should upon service of *subpœna* appear in court at their own charge; for that they have refused the favour of the court; the commission being awarded specially for their ease, that the country people should not be called from their affairs to yield their testimony, as well as for the aliant's ease, to save his purse: but the *lord chancellor Egerton* determined the question, that no man can be compelled to appear unless he be required under the broad seal, and being so required, a witness must have his costs tendered; and therefore the calling by precept is not compulsory, nor shall cause the party to be examined at his own charges. And it seemeth to me that the antient course stood upon good reason; for the commissioners have their authority under the broad seal to call witnesses before them, and their warrant shall be compulsory under their seals, as well as the warrant under the hand of any justices of the peace to call persons before them, and the authority equal.

In the third place, I am to declare how matter required from the witnesses shall be drawn from him. And that is by ministering fit questions unto him, which are called Interrogatories: and those are to be put in court before the return of the process, or otherwise he may depart without being examined, and without danger of contempt: and those must be pertinent to the matter in question, not of foreign matter; for so by examining a witness in one cause, I will discover before publication what he can say in another, which was held a great offence in *Harvy* at the suit of *Backing:* neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice, and hath been punished by fine and imprisonment, and now always by imprisonment and costs; and it is the folly of the wit-

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nefs if he ſhall give any anſwer to any ſuch ſcandalous and impertinent queſtion; for the oath miniſtered to the witneſs is, "You ſhall make true anſwer to ſuch interrogatories as "ſhall be miniſtered unto you as a witneſs concerning this "cauſe, without partiality or affection to either of the par-"ties;" ſo that if the queſtion concern not the cauſe he need not anſwer it, whether it be ſcandalous to himſelf or to any other, if not concerning that crime in queſtion: but of this in another place, after publication, when it may be diſcovered.

BUT the great queſtion hath been, Whether a witneſs which in examination will not give any anſwer ſhall be compelled to make anſwer to the interrogatories? And it hath been ever held, that the witneſs's teſtimony muſt be truly voluntary, and not conſtrained; for how ſhall wilful perjury be aſſigned upon a conſtrained oath, which may be done upon every oath? and therefore if a witneſs conceive that the anſwering of a queſtion may be prejudice to himſelf, it ſeemeth that he need not to anſwer; for he is produced to teſtify betwixt others, and not to prejudice himſelf, where he is produced as a witneſs. Yet in the Dutch cauſe the goldſmith apprentices refuſed to give anſwer to their examinations, alledging that they were ſworn not to reveal the myſteries of their trade; and they were committed until they were examined. But that Caſe was a Caſe of State, wherein the Commonwealth was much intereſted, and I hope will be no precedent to future times; for I can well remember, that I moved the *lord Egerton* in ſuch a caſe, where a witneſs gave no anſwer to the interrogatories, for that he did not depoſe, which was a manifeſt refuſal; who gave me anſwer, that he knew no law to compel a witneſs to ſpeak more than he would of his own accord. If either plaintiff or defendant be ſlack in examination of witneſſes, he which haſteth to conclude the cauſe may give day for publication. And in antient times there were three days given to produce witneſſes; in imitation whereof the court of chan-

PART III. cery giveth to this day three rules before publication; and this court hath always allowed two commiſſions and a day peremptory. And the rule in antient times was entered in this manner: *dies datus eſt ad producendum teſtes primum*, and then *ſecundum*, and then peremptory.

BUT if the party to whom the rule was granted, deſired to conclude the cauſe either upon one examination or ſome few, his refuſal to examine more witneſſes was entered of record; and of late times, if the plaintiff will examine all his witneſſes in court, he giveth notice to the defendant by a rule entered with the regiſter, to the end the defendant may ſue forth a commiſſion to examine his witneſſes, if he pleaſe.

BY the order of the 38. of *Eliz.* as alſo by the *lord Egerton*'s latter orders made by conſent of all the judges, if the plaintiffs after publication forbear proſecution for the ſpace of three whole terms, and produce no witneſſes, the cauſe is to be diſmiſſed, unleſs he ſhew good cauſe to the contrary in open court; or if he do termly make a ſhew to proſecute, and do nothing effectually, the court upon oath will diſmiſs the defendants; the ſame being but a dallying with the rule of the court, to the form of it in ſhow and not in ſubſtance.

AND thus I have run through this treatiſe of examining of witneſſes, wherein I have ſpent more time than in any other, for that the books of common law do yield ſmall direction for examination of witneſſes, and the civilians are therein far too copious.

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§. XXII. OF THE READING OF PROOF ON THE HEARING OF THE CAUSE.

THE witneſſes being examined, publication then is to be granted of them by the court, which is the concluſion of the cauſe; and after that order entered, there

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can be no more witnesses examined: but if the witnesses were formerly sworn, and the interrogatories whereupon they are to be examined put in court, although they be examined after, yet it is the same as if they were examined before publication. But commonly there is in the rule of publication a *salvo* for such as are sworn; for these are those *Fitzherbert* speaketh of: *testis si fuerit in termino, licèt deponat post terminum, valet ejus testimonium*; but to produce witnesses after publication, is held a matter very pernicious, and that which, if it were allowed, would make causes infinite.

It is true, that there are some precedents where such examinations have been allowed; but the same hath been either by consent of parties, by reason of the undue entering of publication, to convince the malicious clamour of one of the parties, or to satisfy some doubt to the court, which ariseth out of some scruple of their own conscience wherein the court desireth to be resolved, and not upon the suit of either of the parties: and this is that which is called *ad informandum conscientiam judicis.* For by the consent of parties in the Dutch cause, *Moyses Tryant*, who had witnesses examined against him, and published before the first hearing; and upon notice given by the attorney general that he would examine other witnesses against the next hearing, and that the defendants, if they would, might do so likewise, and only *Moyses Tryant* did so; this was held by the court an implied consent; and the court proceeded and sentenced him upon the testimony of those witnesses examined by consent by implication. But there is no doubt, if it had been a public and actual consent, it would have taken away scruple; for surely *conscientia tollit errores*, and the time of producing witnesses is but an error of producing.

In case where publication is unduly entered, there future examinations are granted; as in the Case of *Wombwell* and *Wombwell* before mentioned, where it appeared that the

PART III. defendants, whom the cause principally concerned, had never any notice that warning was given to examine witnesses by service of *subpœna* for that the defendant served was of confederacy with the plaintiff, and therefore witnesses were newly examined. And in the Case where the king's attorney was plaintiff against *Gunter* for the imposture for pulling pins out of the flesh of a young maiden, after the king's witnesses were published and seen by the king's counsel, the king's attorney suggested to the court that publication was entered without his warrant, which ought not to have been done in the king's cause, and so desired further examination; and because undue publication, *est quasi nulla*.

But the judgment of the court in this was of excellent direction, that after publication examination should be stayed until precedents were searched; for that in truth in this case the court will not grant future examination after the parties have seen the books, but it will require, to avoid such a publication, and to examine *de novo* must swear, that he hath not seen the books; and then the names of the witnesses being brought into the court that the other side may know them, the interrogatories being perused by some ground judges that they be not captious, the examination may be allowed. Sometimes the court will give liberty to a clamorous person to convince his malice more than is due unto him. So in the Case between *Rich* and *Wallop*, 13. *H.* 7. where the plaintiff had liberty to examine after publication, *ad convincendum sui malitium*: and the like to that was *Pasch.* 11. *Eliz.* to *James Warner* against the *lady Marvyne*; but that was by the queen's express command delivered by her attorney general, in which case she went further to re-examine all the witnesses he had formerly examined, *ad informandum conscientiam consilii*; only there was some care had to avoid subornation or ill instruction, for the clerk of the court himself was enjoined to take the examination, and *justice Weston* to be present thereat.

But

PART III.

But for the last, which is for the satisfaction of the court upon hearing, many precedents have been in that kind, but that always when the court hearing the cause findeth it perplexed, and that the truth cannot be discovered without a further examination; as perhaps witnesses are produced in whose custody a forged deed is found, and the party conceiveth that either he delivered it or received it from the forger, and that the testimony of the witness cannot but discover the person; but what he discovereth cannot be seen by him till after publication, and then he can examine no more; upon view of whose deposition another person is vouched, and upon whom the whole cause resteth. In this case the court, being the most excellent searcher of truth, may require the examination of the party before they will give any judgment. So in this wise 13. *Eliz.* did the court, upon hearing the cause betwixt *Rowland Hind* plaintiff and *Lodowicke Breenevile* defendant; and a new day appointed for the hearing the day following. And of this nature, in *Trin.* 3. *Jac.* was the cause wherein *Nicholas* complained against *Hitchcock* for counterfeiting an injunction from the marches of *Wales*. *Hitchcock* sent one *Windowe* to an attorney at the marches to procure an injunction, who procured it and sent it; but therein mistook the names, and enjoined the defendants instead of the plaintiffs. *Hitchcock*, finding this mistake, made an injunction to the right person, and took off the seal which was the true one, and fixed it to that, and delivered it to one *Wollery* to be delivered to the defendant; who did so, and the defendant served this false injunction. But these persons being unknown to the plaintiff, no man which was examined would charge *Hitchcock* with having the true injunction, and so no likelihood to satisfy any: the court thereupon ordered the cause to stay, and *Windowe* and *Wollery* to be called up and examined, and thereupon the cause to be proceeded in to hearing, which was done accordingly.

PART III. So in *Mich. Term* 3. *Jac. sir Edward Dymocke* was plaintiff against the *earl of Lincoln* for buying of a statute; and *champerty* being best known to one *Bradshawe*, *Bradshawe* was not examined. The court, upon hearing, finding that the truth could never be cleared without *Bradshawe*'s examination, surcease the hearing, and ordered *Bradshawe* to be examined, and then the cause was heard. And in these cases copies of the depositions were given to both parties; which useth not to be in civil causes, when witnesses are examined *ad informandum conscientiam judicis*. And of this nature, although much differing, hath it been, when witnesses have been heard sometimes in open court at the hearing; and the same hath been rather allowed than an examination *ad informandum conscientiam judicis* at the request of any of the parties: for I find 34. *Eliz.* in a cause betwixt *Tayler* and *Holt*, the plaintiff making such a request was delivered; but the witness willed to be present at the hearing: and it is worthy of observation; for such a witness being most material to the weight of the cause, the wisdom of the court will best discern him upon view. And in this kind king *James* examined the *lord Wentworth*, in the *countess of Exeter*'s cause; and in *Speke*'s Case against *Moore*, a brother of sir Robert Winwood's was heard in open court, and much questioned by the court.

Besides all these reasons of examining witnesses after publication, there hath been also another course used most unduly, which was an examination *de bene esse*; and such a one was taken in *Booth*'s Case after publication: but the same was so sharply reproved by the court, and the examiner's boldness to attempt it so bitterly rebuked, as it hath been altogether forborne in these late times.

Thus I have shewed what this court out of their discretion have done, thereby to shew their power; but this great and sovereign arm is not to be stretched out in all

cases,

cases, for that would destroy order and course, but must be rarely used, and in great and weighty causes.

THE parties having all their witnesses published, if they find any undue course of examination used; as unlawful scandal against the parties or witnesses—a witness secondly examined when he was short in his former examination—matter examined merely impertinent to the cause—he that is grieved is then to move the court before the hearing of the cause, when for scandalous matters the defendant shall be committed, and pay costs for impertinency. He shall not only pay costs, but in these cases the matter shall be suppressed: where I may note, there is no scandal but is impertinent; for if it be pertinent to accuse or excuse, it shall not be said to be scandalous; as it was adjudged by the whole court in the Case of *Halakenden* against *Abbot*, where the plaintiff charged the defendant, being his tenant, with forging a copy of a presentment; the defendant, to excuse himself of forgery, examined witnesses to prove that the plaintiff's steward of his manor was a forger, which might have tended to his excuse, although the presentment fell out to be forged.

IF when there is no presentment, nor cause of reference for consideration of undue examination, the plaintiff doth not get his cause to be heard, in antient times the plaintiff was three several times admonished by the court to proceed to the hearing of his cause; and an entry was always made, *A. B. per cognisat. ad persequendum contra in primo et secund.*; and the third time the entry is, *W. hodie 3. per cognisat. persequendum, eò quòd non comp. defendent. dimittant ab hac instantia omnia cum expensis factis in quibus nondum taxati condemnat. prædict. A. B.*

BUT by the order of 18. *Eliz.* the defendant was ordered to attend the clerk of the court; and after publication, if the plaintiff did not procure his cause to be en-

PART III. tered in the general book of hearing within three terms, then the cause was to be dismissed, unless the plaintiff did shew cause to the contrary in open court the term then next following.

This general book is kept by the clerk of the court, wherein any plaintiff may enter his cause, after he hath paid to his attorney or to the examiner for the copies of his books after twelvepence a sheet, as for all other copies beforementioned; and he cannot be received to enter the same in that book, unless the same be satisfied: and out of this book the lord chancellor or lord keeper appointeth causes to be heard upon the day of hearing in open court, although he hath power to appoint causes of which he hath notice before they be entered there; but the *lord Egerton* many times set them down in order as he found them in the book. But of these in the next place.

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§. XXIII. OF THE SENTENCE OF THE COURT.

The cause, as I have shewed, is appointed to be heard by the lord keeper, who maketh choice of such causes as he thinketh fitting for the dignity of that court, and for the present time, and relief of the suitor who is in greatest want of justice; and therefore the *lord Egerton*, conceiving that the attorneys best knew the client's cause, gave liberty to them to prefer such causes as their clients which most urged them, which were most earnest, and solicited them to prefer; and those, after the cause required by the king's attorney, were always set to hearing: but if there were not enough to fill the paper, he took them in order out of the general book of hearing. But because it is his charge to set fitting causes for the lords judgment, he many times required those which were of counsel in the cause upon whose judgment he durst rely, to certify him whe-

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ther the cause were fit to be heard: but the same was seldom done; for if the same be not proved, the king hath his fine of the plaintiff; and if proved, the defendants are fined after their offence; so that in all cases that come to hearing the king hath his fine. For if so be the plaintiff do not proceed at the hearing, either by absence, or by silence acknowledge that he hath failed of his proof, the plaintiff shall be fined *pro falso clamore.* If the plaintiff and defendant intreat that they may end the cause, the court will seldom suffer the same, unless there be much nearness of blood or other affinity or neighbourhood betwixt them; in which cases the court sometimes alloweth their agreement; but otherwise they are to pay a fine *pro licentiâ concordandi.* And *sir Edward Coke* moved once to have a fine imposed upon a plaintiff *stultiloquio*; but that was but as one swallow. And in fines *pro licentiâ concordandi* the fine is to be paid by both; but if the plaintiff make the composition without license, the fine ought to be set upon as *pro falso clamore.*

And cases are now appointed to be heard by the lord keeper after every term for the next term following, at which time he appointeth for every sitting day a cause: and it is best that they be set at the nomination of the attorney rather than by the preferment of followers.

And the causes so set to be heard, are either set at the request of the plaintiff or of the defendant; or if the defendant desire to purge his reputation by the public judgment of the court, he may as well set it to be heard *ad requisitionem defendentis* as to get it dismissed for want of the plaintiff's prosecution: and in those cases the court will for the most part give the defendant damages if they find him innocent, but punish his boldness the more heavily if they find him guilty; so that he must have a clear cause who presumeth, being a defendant, to press the hearing of the court.

And

PART III. And the cause being set down in the especial book, the clerk of the court maketh a warrant to the process-maker to make a *subpœna* directed to any of the principal defendants to hear judgment; which *subpœna* is in the words with the *subpœna* set down before, but indorsed in these words, *ad audiendum judicium ad sectam A. B.* The process must be served, and the service of any one is the service of all charged with the same offence; but this notice must be left, and service of process given in reasonable time before the hearing.

And therefore in the king's attorney's Case against *Worster* and *Watson*, the defendants being bound to be at the hearing were served, and their names mistaken in the process; so that thereby the plaintiffs failed. A second day being appointed for the hearing, a process was left at *Watson*'s house four days before the hearing; and this adjudged sufficient warning. And in the Case betwixt *Lennel* and *Swain*, *Hil. 3. Jac.* the process *ad audiendum judicium* was served upon the defendant the 24th of January, which was the day the cause was appointed to be heard; but other causes having priority that came not to be heard till the 5th of February, adjudged not well served, for that it must be a good service for the 24th of January or not at all.

And although the judges have denied that the leaving of the *subpœna* at the house was no sufficient process to hear judgment, but sufficient to have process of contempt to give appearance, yet the *lord chancellor Egerton* ever constantly maintained it, for that the defendant is intended to be always in court by himself or his attorney, and therefore an ordinary means of service shall be sufficient; and so leaving the process at the defendant's usual lodging, when he had no house, was held sufficient service in doctor *Alablaster*'s Case.

I have said before, the process must be served upon any one charged with the same offence, and that shall be the

the ſervice of all; for if divers men be by one and the ſelf-ſame bill charged with ſeveral offences, as ſome with forgery, and ſome with riot, and ſome with perjury, the ſervice to him that is charged with the riot is no ſervice to him which is charged with perjury or forgery; but it is a good ſervice to him that is charged with the procurement of the riot. Nay further, if ſeveral men be charged with ſeveral offences of one and the ſame kind, they muſt be ſeverally ſerved to hear judgment; and ſo it was adjudged in the *Dutch* cauſe, that the tranſportation being a ſeveral offence in every man, as it were ſo many ſeveral cauſes, every man was to be ſerved ſeverally to hear judgment: and ſo, at the firſt hearing, thoſe that were not ſerved were not proceeded againſt.

But ſufficient notice being given to any one defendant in the ſame fact, he muſt appear by his counſel at his peril; for upon oath made of the ſervice, the court will proceed in his abſence; but then the anſwer of the defendant muſt be fully read in open court before the lords.

The time of the lords hearing of cauſes was heretofore every day in the week, yea many times both in forenoon and afternoon; but afterwards in 8. *H.* 8. in the time of *cardinal Wolſey*'s regency, he firſt appointed four days in the week to ſit in the Star Chamber, and two days only in the chancery: and afterwards in 10. *H.* 8. the lords appointed to ſit in the Star Chamber on Wedneſday and Friday for reformation of enormities in the king's courts; and afterwards, about 15. *H.* 8. there were ſix of the council appointed to ſit in the Star Chamber to expedite the cauſes, which was to give rules and orders of proceedings; but after that uſual courſe was ſettled in enſuing times, the clerk of the court ſat alone to ſee ordinary courſe obſerved in proſecution of cauſes upon all the days of the week but when the lords ſat to hear cauſes: by all which it appeareth that this court may ſit at their pleaſure every day of the week if they pleaſe, and may ap-

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PART III. point any of the lords to ſit and give orders; for ſometimes the *lord Egerton* did in that time of the great plague appoint mr. *Mill*, the clerk of the court, to give orders in matters of courſe; which he did in the end of a term, and was very able to perform the ſame.

FOR it is a marvellous hindrance to the ſuit, if ſome time be not appointed to give orders as well as to hear cauſes; yet are not the days appointed for hearing to be ſpent in motions, for that will be very prejudicial to the ſuit and the king; but their times are to be as faithfully obſerved as may be, without alteration or interruption. And I cannot but note, that in former times four days were yielded to this court every week, and but two to the chancery; and the place of the lord chancellor or lord keeper was in this court for power, ſovereignty, and authority, direction, eloquence, and ſervice of the ſtate, above others; but how fallen to this change I know not.—But to proceed.

CASES which come to hearing are either upon the confeſſion of the defendant, or upon proof or teſtimony of the witneſſes.

AND hearings upon confeſſion are either upon the parties anſwers or examination, and ſo immediately appointed to be heard; or after the examination of all the witneſſes the plaintiff may warn them all, and proceed only upon the confeſſion.

MANY and uſual are the cauſes heard upon confeſſion of the parties; but they are much the fewer, for that the defendant's counſel at theſe hearings tieth the party to the bare confeſſion of the defendant both for manner and matter.

AND if any thing be read wherein he accuſeth himſelf, they may and ought require any thing in the anſwer or examination to be read, as it was in *Dreyton* and *Morris*'s Caſe; for by the plaintiff's entry of the cauſe to hearing upon confeſſion, he excludeth the defendant in the one caſe from making of any proof, and in the other caſe when he waveth the depoſitions of witneſſes from uſing his proof; and

and therefore good reafon that the defendant fhould ufe his own allegation for proof.

BUT it is fometimes care for the plaintiff to wave all the depofitions of witneffes; yet in *Hil. Term* 3. *Jac.* I remember in the Cafe of *Page* v. *Page*, upon this occafion, for that when the caufe came to be heard the defendants took exception that publication was not entered, and therefore they could not proceed upon the examination of witneffes; and thereupon the plaintiff waved the teftimony, and proceeded upon the confeffion.

AND in thefe cafes of confeffion the defendants have this privilege, that if one defendant confefs matter againft himfelf and another, the confeffion can hurt himfelf alone, and no other, for he muft ftand or fall by his own mouth; and as the defendant hath that advantage in the one cafe, fo hath the plaintiff in another, for that if his bill be uncertain, yet upon his confeffion the defendant fhall be fentenced, yea although there were no bill; as it was in *Bruncker*'s Cafe, and fince adjudged in the Cafe of the king's attorney againft *Brereton*.

IN hearing of caufes upon depofitions the plaintiff hath this advantage, both of confeffion and teftimony, for he fhall urge the defendants what he can to convict the defendants out of either; and in that cafe the confeffion of a defendant accufing himfelf with another is a good teftimony; otherwife, if by accufing another he accufe himfelf: yet is not that a teftimony which will carry a conviction of itfelf, without fome other concurring teftimony or violent prefumptions; yet is it held ever fo much ftronger than a fingle witnefs, as *oculus teftis* is better than *auritus*. But if the plaintiff read a defendant's examination to convict any, the defendant may read at the fame examination to all that interrogatory to excufe him; for perhaps he explaineth his own meaning in fome other part of the interrogatory: but if the explanation be in another interrogatory, it is moft ufually allowed. But

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PART III. in *Pasc.* 4. *Jac.* in the cause betwixt *Joanes* and *Wolridge*, it was allowed to be read in another's interrogatory; and if that interrogatory which is read by the plaintiff have dependance upon answer, then the other shall be read; as in the Case of ———— in *Hil.* 4. *Jac.* where by reason that the word *aforesaid* was contained in the article, the former article to which that word related was read for the defendant.

AND in setting down how examinations shall be read, it is fit that I declare my meaning; for when the bill is opened by the plaintiff's counsel, and the answer opened by the defendant's counsel, or read by the plaintiff's attorney, the plaintiff then doth state the question; and then the plaintiff's counsel appoints his attorney to read the proof which is in the cause: for if the plaintiff will read proof made in another court, or in another cause, it is not allowed but by consent of parties; and the same must be moved to the court before the hearing, to the intent that the other side may take notice of it to answer unto such foreign testimony, who could not but be surprised thereby. Yet the oath of a defendant taken in another court shall be used at the hearing in this court to manifest his falsity, if it be moved beforehand, although the defendant will not yield thereunto; as it was held in *Collon* and *Sewer*'s Cases. But the records of other courts shall be used at the hearing of causes produced under seal, or proved by copies, so that the copies remain with the clerk of the court; for they are incorporated into the deposition; and if it be otherwise, when it is offered to be read in the court, the party on the other side may take exception, and then it shall not be read.

IF the king's attorney put in an information by the relation of a party grieved, the party grieved cannot be used as a witness; but the other side, when he is offered to be read, may except to him, and the court will always reject him. Open partiality discovered in a witness by proof or proximity,

proximity, is good cause to alledge that he shall not be read; so is conviction *de crimine falso*; but falsehood in the same cause is no reason to bar him to be read, but that falsehood may be made to appear in the defendant's defence.

THE defendant hath always as much time to excuse as the plaintiff hath to accuse, and more; and sometimes favour to use divers testimonies in defence, which the plaintiff shall not have to accuse; as the depositions in other courts were used for *Wallis's* defence at the suit of *Sallaway* for a forgery whereof he was convicted, which was cited to the king's attorney in a cause of forgery, although the witness whose testimony was offered to be read was ready, and so could not be examined; which course is most honourable, for that the sentence of this court strikes to the root of men's reputations, and many times of their estates; and therefore they always require indifferent witnesses, clear proof, not by relation and double testimony, or that which amounteth to double testimony; as, a witness positive, and accompanied with the presumptions which supply a testimony; or, where there can be no direct testimony, in works of darkness, necessary presumption.

THE proof being read, sometimes in one day sometimes in many, the lords proceed to their sentence, which is always delivered in great silence, and without any interruption, the inferior beginning, and so in order every man, and the archbishop last before the lord chancellor or the lord keeper, if the treasurer be not the supreme judge at the time; in which sentence, if the lords deliver any sentence doubtfully, they may afterwards declare themselves to the clerk of the court; and so it was in *Whittingham's* Case reported by *sir Edward Coke*; and not long since *Hastings'* Case *versus Darvile*.

THE greater part of the judgments of the presence maketh the sentence; but if they be equal, the voice of the supreme judge maketh the sentence, as I have before related to be judged in the *earl of Northampton's* Case; and

PART III. and ſo it was in *Weſtingham*'s Caſe, for the point of forgery of the ſtoffment and letter of attorney then in queſtion; and alſo in *Hills* and *Prieſtwood*'s Caſe, 44. *Eliz.* And in this ſentence the court doth puniſh the offender, and relieveth the oppreſſed. The puniſhment is by fine, impriſonment, loſs of ears or nailing to the pillory, ſlitting the noſe, branding the forehead, whipping of late days, wearing of papers in public places, or any puniſhment but death. The parties relief is by reſtitution of what is taken away by damages, making acknowledgment of their offence, and aſking forgiveneſs.

FINES are new of late impoſed *ſecundum qualitatem delicti*, and not fitted to the eſtate of the perſon; ſo that they are rather in *terrorem populi* than for the true end for the which they were intended, when fine and ranſom was appointed, the ranſom of a beggar and a gentleman being all one to the caſe of the crown, the great detriment of the Commonwealth.

IMPRISONMENT always accompanieth a fine; for if the party be fined, he muſt be impriſoned, and there remain until he find ſecurity to pay his fine, and then muſt pay his fee to the warden of the Fleet, which is ten pounds a baron, five pounds a knight, five marks a gentleman, five nobles a yeoman; but the yeoman's fee is vaniſhed, the keeper for his gain making every man a gentleman. I name the fee to the warden of the Fleet, becauſe that is the moſt uſual priſon; but the Tower is as uſual in great cauſes; and in former times the Marſhalſea often, or any other priſon that the court thinketh convenient.

LOSS of ears is the puniſhment inflicted upon perjured perſons, infamous libellers, ſcandalors of the ſtate, and ſuch like.

BRANDING in the face and ſlitting of the noſe is a puniſhment inflicted upon forgers of falſe deeds, conſpirators to take away the life of innocents, falſe ſcandal upon the judges and firſt perſonages of the realm.

WHIP-

WHIPPING hath been used as a punishment in great deceits and unnatural offences; as the wife against the husband; but never constantly observed in any case but where a clamorous person *in formâ pauperis* prosecuteth another falsely, and is not able to pay him his costs; *quod non habet in ære, luat in corpore.*

WEARING of papers hath been used in all ages, and before the statute of 5. *Eliz.* was the usual punishment of perjury, but since hath been used as a punishment for oppressors and great deceits.

I CANNOT set down every particular punishment, for that the same is sometimes only the punishment appointed on the act of parliament; as in forgery, the defendant, if he be convicted, is to have the punishment of that law: so for taking away of maids, the punishment of the statute 4. & 5. *Philip & Mary*; and so for maintenance, false tokens, and such like; in which cases the court limiteth no express punishment, but convinceth the defendant, and he is to receive the punishment of the statute. So when his majesty had expressed a punishment in his edict against duels, in his own most judicial and eloquent sentence he expressed no other punishment, but left them to the punishment contained in the edict.

SOMETIMES the punishment is by the wisdom of the court invented in some new manner for new offences; as for *Traske*, who raised Judaism up from death, and forbade the eating of swine's flesh, he was sentenced to be fed with swine's flesh when he was in prison.

SOMETIMES the opinion of the court of the offence and the offender is held to be a punishment; and then the sentence is ordered to be publicly read at the assize, either of the county where the offence ariseth, or in all assizes, as it was in the case of duels.

THE relief of the party made by restitution of that which is unjustly taken away by force or fraud, is very

PART III. obſervable in *Seſſon*'s Caſe, 10. *H.* 8. where there is a notable precedent, that the defendant dying, the court appointed perſons to inventory all goods they found of his, and reſtored out of them that plaintiff's proper goods, and ſatisfaction for others out of the reſt of the goods of the inteſtate. And in the caſe of reſtitution, the clerk of the court hath no benefit of poundage; whereas in other caſes he hath twelve-pence in the pound for every awarded pound. And the judges of the common law have a little ſtrangled in this point, ſuppoſing that this court ought not to meddle with the property of goods, or the poſſeſſion or title of lands. Sure I am, that in the time of *H.* 8. there are a multitude of precedents where cattle were ordered to be reſtored in kind, or others as goods; and there is a decree of that nature in one *Day*'s Caſe againſt *Cole*, in 9. *H.* 8. And in latter times for reſtitution of poſſeſſion of lands, in *Rowle* and *Morgan*'s Caſe, 45. *Eliz.* where a poſſeſſion was taken away by force, the court reſtored it, and ſettled the plaintiff in poſſeſſion: and it ſeemeth unto me, that it ſtandeth with all reaſon that if my land be withheld from me by a forged deed, when the deed is judged in the court to be forged, that my land ſhould be reſtored; and ſo the court did in 10. *H.* 7. And if by perjury upon an evidence I have let my land, if in this court I convince the witneſs of perjury, it is ſtrange that this court ſhould not have power to reſtore me to that they find is taken from me by falſehood. But the former decrees were for the moſt part not concluding the right but until the other ſide could recover it, or they ſhewed better matter to the court; and yet the judges did conteſt in this with the *lord chancellor Egerton*, in the Caſe of *ſir Rowland Egerton* againſt ———.

For damages to the wronged party this court is the beſt jury; and when they have juſtly diſcerned the wrong, they make the moſt ample recompence, and requite the wronged

wronged perſon's labour and travel ſometimes with all his injury: yea, an informer hath had for his travel by way of damages a great reward; as one *Pierre Lloyde* had one hundred pounds by ſentence of this court againſt *Cadwallader Price* for embezzling the armour of the country, he being made a deputy lieutenant: and this is the excelling part of the juſtice of this court, which is accompanied with a moſt excellent privilege, that the party grieved ſhall be ſatisfied before the king, who in all duties in other courts hath his prerogative. This hath ever been infallible, except in *ſir Thomas Lake*'s Caſe, where the king and party went hand in hand, becauſe there was ſufficient to ſatisfy both.

For giving the party ſatisfaction by ſubmiſſion, great queſtion hath been, whether it be part of the puniſhment or of the recompence: for if it be part of the puniſhment, the king may pardon it; if of the recompence, the party is intereſted: and I conceive, that where the party is to make a recognition of the offence, or to acknowledge the juſtneſs of the ſentence, that trencheth only to the puniſhment, and ſo the king may pardon it, as he did *ſir Humphry Tuſton*, at the ſuit of *mr. Nevill:* but where there is a clauſe of aſking forgiveneſs, that is not in the king's power; as it was in *ſir Thomas* and the *lady Lake*'s Caſe. Yet may the king diſpenſe with the manner, as he did with the *lady Roſs*'s acknowledgement, ſtanding in perſon at the bar; yet was ſhe to acknowledge the wrong, and ſo did, becauſe the manner ſounded to puniſhment rather than to ſatisfaction.

The entry of the ſentence is referred to the truſt of the clerk of the court, and he only may draw them, unleſs where the lords appoint the king's counſel to pen the ſame, or where the king is intereſted; in which caſe they may only meddle with the form, but they may not alter the matter unleſs the clerk be miſtaken: and if queſtion ariſe thereupon, the court muſt be attended, and publicly

PART III. licly moved. And being entered it is irrevocable, and not to be avoided but by the king's command alone, who seldom disannulleth the matter, but many times pardoneth the punishment.

And so tender the court is of upholding the honour of the sentence, as they will punish those which speak against it with great severity; as they did *Finch* and *Pattridge*, for certifying his majesty upon a petition matter which crossed the sentence of the court in the Case of one *Harlakenden*. And by this great sentence the defendants sometimes are fined, sometimes dismissed; sometimes the cause is left to a *non liquet*, sometimes referred to a trial at law; sometimes the matter complained of condemned, but the persons not sentenced; sometimes the plaintiff fined *pro falso clamore*, sometimes not fined because he had *probabilem causam litigandi*.

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§. XXIV. OF THE EXECUTION OF THE SENTENCE.

The sentence being pronounced and entered, in the next place followeth the execution of the sentence; which consisting of two parts, must necessarily have two executions:

The fine and punishment, which belong to the king and Commonwealth; and the recompence, which belongeth to the party.

The fine hath one perpetual certain course; that is, it is estreated into the exchequer, and levied as any debt to the king; and the king hath prerogatives for levying thereof which he hath for any other debt whatsoever, except only that the parties damaged in that cause must proceed for the punishment. The party sentenced cannot be delivered out of prison until he have undergone that, or procured

procured a pardon for it, or given ſecurity to the end to undergo it. PART III.

BUT for the parties relief, if the perſons be contemptuous, the court hath uſed divers means of correction to compel the perſons ſentenced to perform the decree.

SOMETIMES by the king's expreſs letters of command; as in 10. *H.* 7. the king wrote his letters for the performance of a decree formerly made, which the defendant neglected.

SOMETIMES by commandment to the Tower, being always *crimen læſæ majeſtatis.* So *Patrick Bellew* was committed to the Tower 10. *H.* 8. for not yielding a poſſeſſion, and reſtoring goods ordered by the ſentence of the court.

SOMETIMES by new fines impoſed upon them for their contempts. So was *Hugh Cartwright* fined firſt ten pounds, then forty pounds, then one hundred pounds, in the 6. *Ed.* 6. for not performing the decree of the court in repairing a chapel which he was ordered to repair for divine ſervice.

SOMETIMES the defendants were enjoined, under a pain or ſum of money to be levied of their lands and goods, to perform the decree. So was *Nicholas Fairfax* enjoined under the pain of two hundred pounds in 24. *H.* 8.; *ſir Richard Corbett* in five hundred marks; yea, the *lord Zouch* in two hundred pounds.

SOMETIMES this command was contained in a writ of injunction. So was *Robert Martin* enjoined upon pain of five hundred pounds in 25. *H.* 8.; and in 15. *H.* 8. the attorney and ſolicitor general were commanded to deviſe a writ to command the biſhop of *Norwich* to perform a decree, which was done upon pain of one thouſand pounds.

SOMETIMES by writs directed to the ſheriff, to put the plaintiff in poſſeſſion, or to levy the money decreed; yea, the meſne profits of the land decreed upon the plaintiff's goods; of which there is a notable precedent in 10. *H.* 8. And in the ſame year one *Bregaſſe* was ordered

PART III. ordered to be attached till he paid a ſum of money ordered by the court; and if he refuſed, to levy the money of his goods.

SOMETIMES by writ of extent to levy the ſame of lands and goods; which cauſe was allowed by all the judges, *Dyer* 15. *Eliz.* and purſued in Eaſter Term following in *Stubbs*'s Caſe, and ſettled as a conſtant caſe in *ſir Richard Egerton*'s Caſe. And whereas it firſt began with an Engliſh writ, a writ was framed by the direction of the *lord Egerton* in this manner: but this writ can never be awarded till the plaintiff be in contempt, and hath refuſed to pay, being ſerved with proceſs of *ſubpœna*. Yea, and ſometimes this court compelled a ſtranger that was indebted to the defendant which was ſentenced, to bring his debt into the court to ſatisfy the plaintiff that which was decreed unto him; as in that Caſe of *Stetly* againſt *Dorne*, in 42. *Eliz.*

BY theſe courſes no perſon which hath any thing is freed from performing the ſentence of this court; neither is any place free from the ſame; for if the defendant fly into the kingdom of Ireland, this court hath written letters to command the lord deputy to apprehend him there, and ſend him over in ſafe cuſtody: and ſo one *White* was there attached by a ſerjeant at arms, and ſent over, in the Caſe of *Hole* plaintiff, for an infamous libel.

AND becauſe that execution is the life of the law, and there is no means to vilify a court of juſtice ſo much as to ſhorten the hand thereof, that it hath not power to compel the parties convinced to perform the ſentence; and for that error was grown to ſuch ſtrength before, that by direction of the court in that cauſe of *ſir Richard Egerton*, it was holden a maxim, that this court hath no other means to compel the performance of the decree than by impriſonment of the contemner; and if he would endure impriſonment, the party grieved muſt remain without remedy. Which error had this growth only during the reign of

of queen *Elizabeth*; and the reason it grew to such a head in that time, I verily believe, was, for that in many years, in that fast-springing time of religion, the people had perfectly learned that obedience was better than sacrifice, and there was scarce a man found so impudent as would struggle with the sentence of this high court. It therefore behoveth the great judge of this high court to maintain this power to execute the sentence, which was so worthily regained by the industry of the *lord chancellor Egerton*, of whose care and pains in this particular I was more than *oculatus test.* for I can say without boasting, *quorum pars magna fui*; and I have ever rejoiced to travail in a cause so behooveful to the oppressed, and so honourable to the supreme court of justice of this kingdom; and I hope it doth not detract at all from the honour and dignity of the common law, as some without just ground have conceived:

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§. XXV. OF COSTS.

THE period of the suit in this court is the payment of costs to the complainant, if he complain upon just ground; or to the defendant, if he be unjustly vexed: wherein I must observe, that if any person be dismissed out of this court, which many times happeneth, for want of due prosecution against him, or in any other case, except by pleading a pardon, the lord keeper and lord chancellor are to tax his costs of course; but how much, or how little, resteth in their discretion, except it be contained in the order of dismission that the same shall be without costs; which is many times by consent, and sometimes by the sentence of the court. But if upon hearing a defendant be dismissed without any more words, the lord keeper ought to tax him his costs; or if he forbear to tax them, or if

PART III. there be no order entered that he ſhall have no coſts, the next lord keeper may tax the ſame, although long after. But if the cauſe reſts upon a *non liquet*, there are no coſts to be taxed on either ſide; or if the caſe be referred to a trial at law, or a ſentence in the eccleſiaſtical court, if after the trial or ſentence had the cauſe be returned to this court, no coſts are granted. But if the defendant be diſmiſſed, and the plaintiff left to take his remedy by law, then are the defendants to have their coſts: but if the plaintiff's complaint appear to be juſt as he complaineth, for forging a will, and the will be found to be naught and damned by the court, and yet the perſons cannot be ſentenced as forgers, the defendant, although not convicted, ſhall be ſo far from having coſts, that they ſhall pay coſts. For ſo did *mr. Cownes* v. *mr. Tunſtall*. And in the Caſe of one *Allen*, a citizen of London, who had bond from the friends of one of his apprentices in four hundred pounds conditioned for the apprentice's truth, and the apprentice going from him, *Allen* being deſirous to make ſome benefit of this obligation, yet conceiving that if he ſhould ſue a bond of ſo great value, and he being not able to make any great loſs appear, his ſuit would be ſtayed, he therefore eraſed the letters in four hundred, and made it forty; for which the friends of the apprentice ſued him in the Star Chamber; and the ſame appearing, would not ſentence him as a forger, for that it ſounded not to any man's prejudice, but deemed that deed corrupt and void in law; and in this caſe *Allen* paid the plaintiffs' coſts.

If it appear to the court that the plaintiff had *probabilem cauſam litigandi*, although the court cannot ſentence the defendant, if they leave him ſuſpected he ſhall have no coſts.

If ſome of the defendants be ſentenced, the reſt ſhall have no coſts, as I have before ſhewed, unleſs by the ſpecial order of the court contained in the ſentence. But if in one bill ſeveral perſons be charged with ſeveral offences,

as

as ſome with riots, ſome with perjury, and ſome with forgery, and thoſe which are charged with riot are ſentenced in the caſe, thoſe which are unjuſtly charged with the perjury or the forgery ſhall have their coſts, for that the ſame was as ſeveral bills to that purpoſe; yet if the ſame perſon be charged who is ſentenced for the riot, he ſhall have no coſts, becauſe he is to pay coſts.

I HAVE already ſhewed that the convicted defendants ſhall pay coſts to him which ſueth *in formâ pauperis*, becauſe he cannot travel without expence.

BUT in antient times it ſeemeth that it was a rule, that no man ſhould pay coſts unleſs the adverſary expended money in the ſuit; and therefore when the king's attorney proſecuted the cauſe for the king merely, wherein he never payeth any fees for copies of examinations, or any travel in taking them, but every man in that caſe laboureth *ſans fee*, the defendant was never charged with payment of any coſts. But the *lord Egerton* conceiving that thoſe for the moſt part were the greateſt offenders, and many times men of good ability, made a poſitive order, that coſts ſhould be taxed againſt the defendant, upon a bill of coſts preferred; and out of the coſts all the clerks ſhould be ſatisfied their duties: and this was upon the hearing of the cauſe in 45. *Eliz.* wherein the queen's attorney was plaintiff againſt one *Harwood* and *Tookey*, for an inhuman uſage of a young maid in ſuch ſort as that ſhe languiſhed long, and died after the year and a day.

AND it was received as a courſe, that he which appeared *gratis* without proceſs ſhould have no coſts; but that was over-ruled by good reaſon, as I have ſhewed before, and thoſe coſts are taxed, upon a bill preferred to the lord keeper by the attorney of the party which is to have coſts, which his lordſhip taxeth, and to the taxation ſubſcribeth his name: thoſe bills are delivered to the clerks of the court, as his warrant to grant proceſs for the receiving thereof.

AND

PART III. AND the clerk upon payment of twelve-pence upon every pound which is taxed, and two shillings for the warrant, maketh his warrant to the process-maker to make a *subpœna ad solvendum*; which is directed to the persons against whom the costs are granted, and to be paid to him for whom they are taxed.

WHICH if they be made to some person by confederacy who never expended any money in the suit, although he be named in the writ, yet shall the party have the same costs who bore the charge: and sometimes a release is obtained from some mean person without any money paid; and notwithstanding the same person who bore the charge shall be satisfied.

THE attorney ought to prefer but one bill of costs in one cause, unless there be several orders of dismission; as perhaps one is dismissed upon a demurrer; another, for want of replication to his answer; and a third, upon the hearing; and upon these three several orders of dismission, several bills of costs shall be taxed.

THE party who serveth this process must demand the money of the person upon whom he serveth it, or otherwise he is not compellable to pay it: for perhaps he doth not understand the Latin writ; and therefore it is not sufficient to leave the Latin process at his house, as in other *subpœnas* of appearance; for so it hath been many times adjudged: and he to whom the costs are taxed, hath election to require his money of any one against whom they are taxed, and the party who payeth the same may seek his contribution by writ against his fellows out of this court; but the court hath sometimes assisted him against the rest which are fugitives with the plaintiff's process, after he hath satisfied him to whom the costs are due, as not long since in *James*'s Case against *Wrickham*.

AFTER costs taxed, if the party against whom the costs are taxed die, his executors or administrators are chargeable with the payment thereof; but if he die before sentence,

tence, or before the costs taxed, the costs left; as it was in *sir Sebastian Havye*'s Case.

After the person is in contempt for non-payment of costs, an extent may go against him, as in case of damages; but if he die, and his executors be charged, his testator being indebted by many special ties and judgments, it is a great question, whether the payment of these costs be *devorstie*, as to other creditors upon judgments; and being that it is not, for that the judgment of this court ought to be equal if not superior to any other, and this court upon his obedience must protect the executor against others, if the person against whom the costs are granted will fraudulently convey away his estate, that it may not be found by inquest upon the extent, or strangers will shew forth fraudulent deeds antedated, or made without consideration, to prevent the jury's finding the estate, the court hath assisted the party with their letters to the sheriff for indifferency, and to take into his possession the pretended deeds, and bring them into court; as it was done in the Case of *Hay v. Probatt*, and the court gave order for the examination of the fraud.

And in all cases of costs or damages the king having no interest, the king's counsel may move for the defendant as well as for the plaintiff, for that it is betwixt party and party, and only matter of interest, and not of crime.

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§. XXVI. OF A BILL OF REVIVOR.

I Have now passed through a suit in this court; but there happeneth sometimes that a suit is concluded before this time of abatement; and that is, by the plaintiff's death; and if it be a *feme sole*, by her marriage: in which cases, the heir or executor in the former, and the husband

and

and wife in the latter, may revive the suit, and prosecute it to hearing.

But if the plaintiff be made a knight, or any other dignity bestowed upon him, that doth not abate his suit, so that there needeth not any bill of revivor in that case. And because many questions have arisen concerning bills of revivor, which is a distinct suit of itself, I think fit to conclude this Treatise therewith. And therefore the first doubt may be, Whether, upon the death of the plaintiff, it be necessary to have a bill of revivor or not? for the suit being for the king, the king's attorney may bring the cause to hearing if he please, and then there needs no new bill; which objection hath been often made.

And true it is, that the king's attorney may bring a suit to hearing, if the party neglect, or refuse; wherein there is a default in him for which he may be punished; but if it be by the act of God, it seemeth there must be a party in court, to which the defendant must be legally called by process to appear and answer; for if so be the process be served to hear judgment at the suit of the party, and then the plaintiff dieth, the court will proceed for the king, for he was legally called to hear judgment; and so it was held in *sir Gilbert Garrard*'s Case against *Ralph Egerton*; and in *Hil.* 34. *Eliz.* where the plaintiff dying after the process served to hear judgment, it was resolved by the court, that they should proceed.

But in the Case of the *lady Gresham* against *Booth*, a day was appointed for hearing; but the process not being served, the queen's attorney put in a new bill of revivor, and prayed that they might proceed to punish the offences, and thereupon they were sentenced. But in case there comes a general pardon, which remits all offences which were not depending to be prosecuted, and a suit depending to be prosecuted, and a suit dependeth ready for hearing, and then the plaintiff dieth; in

in this cafe no bill of revivor can be renewed; as it was adjudged in *Drywood*'s Cafe, in *fir Edward Coke*'s Fifth Report; which maketh no doubt whether the opinion in *fir Gilbert Garrard*'s Cafe be law, for that fomething may happen betwixt the fervice of procefs and the hearing, which may be pleadable to bar the hearing; and that being, it is neceffary a bill of revivor fhould be put in whereunto the defendant may plead; for pardon cannot be allowed without pleading, and otherwife he cannot have a day in court to plead.

But there hath been a great queftion ftirred in *Trin.* 41. *Eliz.* in the caufe of *Houghton v. Barron*, where a bill was preferred by *Houghton* the hufband before the 39th *Eliz.* for riots; and after the hufband died, and the wife put in a bill of revivor, whereunto the defendant demurred; and pleaded, firft, that it was pardoned; and then if it were not, yet an executrix could not have a bill of revivor for a perfonal wrong, but *Actio moritur cum perfonâ.* But the queftion being cleared, that it was not pardoned, although juftice *Glanvill*, upon conference with the reft of the judges, certified that the executrix could not by law revive a fuit in this cafe; yet upon confideration of the precedents of the court, the laft day of the term, in the prefence of the greateft part of the judges, it was ruled that an executrix might have a bill of revivor; and fo had accordingly, by reafon the fuit was for the king, and fo the action died not with the perfon; which was alfo adjudged in *Rymans* and *Brickliff*'s Cafe, where the wrong done to the wife by the hufband was punifhed after the hufband's death, upon the hufband's father's complaint. And upon this reafon I conceive, that although in other courts there may not be a bill of revivor upon a revivor, left fuits fhould be made perpetual, yet in this court it may be, the fuit being for the king; which I fubmit with reverence to the opinion of the cafe reported by

PART III. by *sir Edward Coke*, which case I conceive to extend to all civil causes, and not to criminal.

FOR the opinion of the judges is, if a *feme sole* exhibit a bill, and after take a husband, she should not revive a suit, because it was her own folly to take a husband depending the suit; yet by the common practice of this court such bills are revived, and have ever been allowed, for that the suit is for the king; and the heir himself, or his guardian, may, if he be within age, exhibit a bill of revivor in cases where it concerneth the inheritance; as it was in *Gabriel Dennis's* Case *versus sir Arthur Maynwaring*. And the substance of a bill of revivor is no other but that a suit may be prosecuted in the same plight as it was when it abated; and therefore it needs no answer, unless the defendant can plead in bar a pardon, or any disability of the person; which he may be received to do. But if the offence was pardoned at the first, and the defendant did not plead it, it seemeth he hath surceased his pardon, and cannot be received; as it must be granted after the last continuance, otherwise the court will proceed to hear the cause.

AND thus with as much brevity as this matter would afford, I have made a survey of the court, whereunto much might be added; and that which I have written might be couched in better form and words, which hereafter I shall gladly endeavour to effect; and in the mean time submit this my labour, to be confirmed or disallowed, to men of better judgments; hoping I have set down nothing but truth; having pursued so near as I can in all things the direction and opinion of that famous **lord chanceller Egerton**, whose memory I ever

reverence,

PART III.

reverence, and to whom I must attribute all my observations, being glad to shroud myself under the protection of his name, *tanquam sub Ajacis clypeo*; by whose favour, yea private and particular fatherly directions, I have been enabled both in my poor understanding and weak estate; *postulans ut si quid superfluum vel perperam positum in hoc opere invenerit, illud corrigat et emendet cum omnia habere in memoriâ et in nullo peccare divinum sit potius quàm humanum.* BRACTON, fol. 1. cap. 1.*

* The foregoing Tract is printed from a *MS.* in the possession of JOHN TOPHAM, Esq. as far as Part III. Sec. XX. at the beginning of the fourth paragraph, collated with another *MS.* the property of FRANCIS HARGRAVE, Esq. from which the latter part is printed.

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No. II.

OPINIONS *of Three Eminent Modern* COUNSEL *on the* DOCTRINE *of Tacking Prior and Subsequent* SECURITIES*; *and upon the* STATUTE *of* 4. & 5. WILLIAM & MARY, *Cap.* 16. *which respects* FRAUDS *by* CLANDESTINE MORTGAGES.

CASE.

BY indenture of demise dated December 1782, *P.* mortgaged an estate of his called *B.* of the value of near 100l. *per annum* to *D.* for securing 700l. and interest, and by a subsequent deed mortgaged it to the same gentleman for 300l. more, and delivered to *D.* the title-deeds. About December 1786, *P.*'s bond-creditors became greatly alarmed (from reports then circulating of his circumstances) about the safety of their money; upon which *M.* (whose clients and himself were considerable bond-creditors of *P.*) applied to him, and requested he would invest him (*M.*) with a power to sell the estate called *B.* and some other premises in *L.* also, in mortgage to another person (the equity and redemption of both of which was estimated at a considerable value), in order to discharge these bond-creditors. This *P.* consented to, and at the same time assured *M.* that the estate in mortgage to *D.* was not incumbered with any more than the 1000l. to him, and accordingly executed a conveyance by lease and release in trust to *M.*; since the execution of this deed of trust it is come out that *P.* had previously mortgaged the

* The following OPINIONS, given by three Gentlemen in the line of conveyancing, who stand distinguished in the profession by the merit of their literary labours already published, have been obligingly communicated for insertion in our *Collectanea*. The general importance and novelty of the points therein discussed will, it is conceived, render them a desirable acquisition to the common stock of legal information.

premiſes called *B.* to *G.* (without title-deeds) for another 1000l. which with the 1000l. due to *D.* is thought to be the full value of the premiſes, by which *M.* and the other bond-creditors mentioned in the deed of truſt will loſe the benefit of this conveyance as to the eſtate called *B.* if *G.*'s mortgage is intitled to take the precedence to it, by precluding *M.* from purchaſing in the prior incumbrance from *D.* bringing with it the legal eſtate, and thereby protecting himſelf and the other creditors mentioned in the deed of truſt againſt *G.*'s mortgage.

Quære. WHETHER *M.* by paying off *D.*'s mortgage of 1000l. and taking an aſſignment thereof, and thereby getting the legal eſtate in himſelf, and the poſſeſſion of the title-deeds (he not having had notice of *G.*'s mortgage), would in equity be permitted to hold the mortgaged premiſes in ſatisfaction of his own and the other creditors' demands under the deed of truſt? or, What conſtruction, from all the circumſtances of this caſe, a court of equity would be inclined to put on the deed of truſt, in regard to his right of tacking *D.*'s prior incumbrance to it, in preference to *G.*'s, when it is conſidered that the bond-creditors did not certainly lend their money with an eye to this eſtate in particular as a ſecurity, but to all *P.*'s property which was liable to them? and, Whether the bond-creditors not being parties to this deed of truſt to ſignify their concurrence to it, it will not be conſidered merely as the act of *M.* and without the privity of the other creditors, as appears by the recitals in the deed, for the ſafety of their property? Upon the whole, pleaſe to adviſe, on the behalf of *M.* and the other bond-creditors, what may be done moſt to their advantage?

OPINION. H. I AM of opinion, that *M.* and the bond-creditors, by having got a conveyance of the eſtates by leaſe and releaſe (*not having notice of the ſecond mortgage*), may, by purchaſing in *D*'s mortgage of 1000l. and procuring the title-deeds (by which acts they will have the legal and equitable eſtate

estate in them) gain a preference against *G.* the second mortgagee; because I see no reason why a simple-contract-creditor should not better his security by getting a real security or mortgage for his debt, and then cover that mortgage or real security from one intervening, by purchasing in a prior security bringing with it the legal estate: and if one creditor may, I know no reason why several should not pursue the same step: and if the law be so (which I consider that it is), then the other creditors may, in the present case, by their subsequent assent, ratify the act of *M.* and make it valid as to all of them. *Vide* Stephenson *v.* Hayward, Prec. Ch. 310. and sir John Kedworth *v.* Jonas Primate, Hardr. 318.

13th April, 1787. H.

OPINION. G.

I AM of opinion, that *M.* would not, by paying off *D.*'s mortgage, be permitted to tack the bond-debts thereto in preference to *G.*'s mortgage; but that she would be afterwards let in to redeem on payment of the principal and interest due on the former security. If I am right in thinking so, I conceive the most beneficial mode for the bond-creditors will be, that *M.* the trustee should proceed to a sale, and to distribute the money arising thereby in discharge of the mortgages, and afterwards to the bond-creditor as far as it will extend; but it will be advisable previously to communicate with *G.* as to the intention of a sale, in regard that it is not impossible, from the statement of the mortgagor's conduct in concealing his mortgage at the time of executing the conveyance in December 1786, that he might, when he executed *G.*'s mortgage, conceal the former incumbrance, and thereby forfeit to her, under the statute, his equity of redemption, a discovery of this nature would be extremely aukward, either at, or subsequent to, a sale by *M.*

30th Jan. 1789. G.

OPINION. C.

I AM not surprised to find that the particular circumstances of this case have made it the subject of contrary opinions; there is not a pretence for disputing at this day the rule in equity, that a puisne mortgagee buying in a prior incumbrance embracing the legal estate without notice of an intervening mortgage made, may thereby protect himself against such intervening incumbrance, and tack his own and the first together against it; but questions may frequently arise in regard to the extent or application of that rule to particular cases, wherein the circumstances render it doubtful, whether the last incumbrance is a mortgage within the meaning or reason of that rule: admitting the trust conveyance to *M.* so far as respects the benefit of himself and the other creditors, to come under that description, their right to avail themselves of the protection in question, I conceive, cannot be denied; but a difficulty arises on the nature and consideration of that security, as not being a mortgage or pledge to persons advancing or lending their money on the immediate credit of the lands, according to the distinction expressed by the master of the rolls in his argument in the Case of Brace and the duchess of Marlborough, 2. P. W. 491. And indeed if the rule were strictly confined to such cases, I apprehend the present case would not be deemed within it, as the money for which the lands were made a security by the trust-deed, was not advanced upon the immediate credit of that security; but I cannot say I discover sufficient ground to understand the rule in that strict manner: the master of the rolls, in his argument I refer to, was distinguishing between the case of the puisne mortgagee and that of a puisne statute or judgment-creditor; and as one among the distinctions between them, he spoke of the first as trusting his money on the immediate credit of the lands, and the other not, without meaning, I conceive, to lay down a general restriction upon the rule, which, if adopted *in terminis*, would, in respect of the application to that rule, confound all mort-

gages,

gages, upon which the money was not originally advanced at the time of the mortgage, with statutes and judgments. The distinction he first mentioned is clear of any such confusion, *viz.* that between a security carrying a right to the land as a mortgage does, and one that does not, as a statute or judgment before execution. I am not aware of any case that confines the rule to a subsequent mortgagee originally advancing the money at the time of that mortgage, or that notices that circumstance as a point of inquiry or importance; the reason of the rule, as generally laid down in the books, marks no such distinction, *viz.* that the subsequent mortgagee has the advantage of the law accompanied with equal equity: for, whether the creditor originally advanced his money on the security of the lands, or afterwards obtains such security for it, the debt is equally fair, the consideration for the security of course equally equitable, and the land equally bound by and specifically pledged for it; and though not originally contracted, the debt may be considered as permitted to subsist on the credit of the new specific security: upon the whole, therefore, I rather incline to think, that the rule is applicable, in general, to the cases where the puisne incumbrancer has a specific lien or security by way of mortgage or trust for payment of money actually advanced by or due to him, without notice of the intervening incumbrance at the time of his obtaining such specific lien; another difficulty seems to arise in the present case, on account of *M.*'s alone appearing to be the person who applied for and obtained the new security; from which it may be urged, that the other creditors, whose debts are comprised in the same security, were strangers to the credit given to that security at that time; but *M.* it appears, was a principal creditor himself, and more interested than any one of the rest in the apparent sufficiency of and credit due to the security. The other creditors are said to have been his clients, and he probably had been con-

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cerned for them in their former ſecurities, and looked on himſelf as bound to apply for further ſecurity for them; upon any ſuſpicion of reliance upon the former, a ſecurity deſirable to him muſt be ſuppoſed to have been ſo to them, and their aſſent and credit to the ſecurity ſo obtained, ſeems accordingly *to be preſumed* for their own benefit. Any impoſition upon the credit given by him to that ſecurity, extended to the credit ſo implicatively connected with his as that credit cannot be preſumed upon any other terms, than thoſe on which he proceeded. If *P.* had not complied with *M.*'s application for ſecuring the payment of the debts out of the lands, it may be ſuppoſed, that neither *M.* nor the reſt of the creditors would have reſted ſatisfied with their bond-ſecurities, but would have taken ſome ſteps for the recovery of the monies due thereon. Upon the whole therefore, as it ſeems to me that *M.* and the reſt of the bond-creditors mentioned in the deed of truſt did, under that deed, obtain a ſpecific lien or ſecurity on the lands for their debts, without notice of the ſecond mortgage, and that their forbearance of legal proceedings on their bonds, when they began to ſuſpect the obligor's circumſtances, may be fairly aſcribed to the credit given to the new ſecurity obtained by them, I incline to think, they fall under the deſcription of puiſne mortgages, within the meaning and extent of the rule above-mentioned, and conſequently they have, by purchaſing in the firſt mortgage, obtained a preference to the ſecond, and intitled themſelves to tack that firſt mortgage and their ſubſequent ſecurity together, as againſt the ſecond mortgagee, ſo as to retain the legal eſtate acquired by the firſt mortgage, till both the debts ſecured by the firſt mortgage and that by the ulterior ſecurity are ſatisfied. In Matthew *v.* Cartwright, 2. Atk. 347. the holder of the notes, which expreſſed that the money to be received was to be ſecured by mortgage on an eſtate of the perſon who gave the notes, was admitted to protect himſelf againſt a ſecond mortgage

prior

prior to his notes, by purchasing in the first mortgage, though no mortgage had ever been made to him for the money on the notes; so that he had not even a regular trust of lands for the payment of his money, as there was in the present case. We may observe, that on these cases of a puisne incumbrancer purchasing in the first mortgage, he does not require the *aid of equity* to give him the protection desired, that protection depends on equity not interfering to *deprive him* of the estate or interest he has acquired at law under the first mortgage, which being forfeited and absolute at law, would of course keep out the second mortgagee, supposing equity not to interpose; and there seems to be no ground for equity to interpose in stripping a fair and equitable creditor of a legal advantage he has honestly and fairly obtained over the mere equitable claim of another creditor. But though, upon the grounds I have noticed, I incline to think *M.* and the other creditors under the trust-deed are intitled to hold the lands as against the second mortgagee till both debts are paid, *viz.* that on the first mortgage, and that secured to them by the trust-deed; yet I conceive they cannot make a title to a purchaser without the concurrence of the second mortgagee, in whom I presume the legal reversion is vested expectant on the term demised by the first mortgage, and who, though postponed to them, has, I conceive, a title to redeem on payment of their debts.

My above opinion proceeds on a supposition that *G.* at the time of her mortgage had notice of the mortgage to *D.* which I presume was the case from her taking it without the title-deeds; for if she had no such notice, then her estate being made irredeemable by the act of the 4th & 5th William & Mary, c. 16. if that estate comprised the whole reversion and inheritance, there remained no interest or equity of redemption in *P.* at the time of the trust-deed, to pass to or to be the subject of the security by that deed, and of course *M.* and the other creditors could acquire no security or lien at all *on the lands* under that deed to

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intitle themselves to the protection now desired from the first mortgage as puisne mortgages of the same lands.

March 29, 1789. C.

Further Opinion on both points, which was acquiesced under, and proceeded upon. H.

Were it not that I have transmitted to me herewith an opinion of so eminent a conveyancer as mr. ——, corroborated by as decisive an opinion of that great and profound lawyer mr. ——, that the third mortgagee cannot by getting in the first mortgage (the second mortgagee not having had notice of the first, and so being within the 4th and 5th William & Mary, cap. 16.) defend himself against the middle or second mortgagee, I should not have considered the question as to the bond material in this case; having been always *myself* clearly of opinion, that notwithstanding the second mortgagee be *expressly* within the statute, that will not affect the equity between that mortgagee and other mortgagees in the same predicament. As I entertain doubts as to the effect of the bond, I will state my reasons for differing with these gentlemen on the last point; as, should I be right as to the effect of the bond, the title may depend upon that circumstance. The principle upon which mr. —— and mr. —— bottom their opinions on this question is, that if the second mortgagee be within the 4th & 5th William & Mary, c. 16. and her mortgage comprized the inheritance, there remained no interest or equity of redemption in the mortgagor at the time of the trust-deed to pass to, or to be the subject of a security by that deed; and *then* of course mr. M. &c. could acquire no security or lien on the lands *under that deed* to intitle themselves to the protection desired from the first mortgage (*Vide* opinion C.). Now, speaking with deference to that high authority, I should submit that the principle upon which the doctrine of *tacking* rests, is here mistaken; it does not bottom itself upon the foundation of what the mortgagor, making the third mortgage, has

has *in him* to pass, or be the subject of a security to the mortgagee, and on which he (the mortgagee) may have a lien; but it rests upon the principle that the last mortgagee has advanced his money intending to have a security on specific land, the *lien* upon which *proves defective*, and is seised or possessed of the same or other land of the mortgagor, or a charge thereupon by virtue of a prior legal title, of which he cannot be dispossessed but through the medium of equity; in which case equity permits the third mortgagee or purchasor so possessed to tack the money he has advanced to the preceding security, not to tack his subsequent security to the preceding security. And this is evident from the circumstance that when the preceding security fails by effluxion of time if it be a mortgage term, or by satisfaction if it be a judgment, the lien of the third mortgagee fails likewise; for then the primary equity of the second mortgagee avails him against the ulterior equity of the third mortgagee; but until then, the legal estate or lien being in him (the third mortgagee), not capable of being divested but on a ground of equity, and the second mortgagee having no better ground of equity to divest than his antagonist has to retain, he (the third mortgagee) has an equity in him by which he may rebut the equity opposed to him. In order to display the principle fully, it will be necessary to advert to instances where the doctrine of tacking is practised. For example: *A.* mortgages certain lands to *B.* to half the value, he then sells to *C.* and afterwards mortgages to *D.* who purchases in *B.*'s mortgage; it will not be denied but that *D.* may hold out *C. Vide* Oxwick *v.* Brockett, Eq. Ca. Abr. 355. 5. But if the principle were, that *D.* can have no lien unless *A.* had either a legal or equitable interest, upon which his (*D.*'s) claim might attach, it would be clear that in this case *D.* could not tack; for *A.* had nothing to convey, having previously sold whatever he had to *C.* The same observation would apply if the case put were that of a pecuniary charge by judgment.

To

To ſet the principle in a more eminent view, conſider the Caſe of Matthew and Cartwright, 2. Atk. 347.; there one mortgaged his eſtate to *A.* and then mortgaged it to *B.* and afterwards borrowed money, &c. of *C.* on notes in theſe words, "Received of *C.* ——l. to be ſecured on "mortgage of my Stokehall eſtate." Now it is clear that *C.* in reſpect of *B.* ſtands merely in the predicament of only having intended that his money ſhould be ſecured upon land; for, in a conteſt with *B.* who is a purchaſer for a valuable conſideration, theſe notes could not be conſidered as a mortgage, but at beſt only as an agreement for a mortgage, which could not be ſet up, even in equity, againſt a mortgage executed: yet *C.* having got in *A.*'s ſecurity, the court conſidered *C.*'s claim in reſpect of theſe notes ſufficient to rebut *B.*'s equity to call for a redemption of *A.*'s mortgage. Now, if it were neceſſary that the tacking mortgagee ſhould have a lien, this deciſion cannot be ſound; for an agreement for a purchaſe is no lien againſt a purchaſer for a valuable conſideration without notice on a contract executed. To go one ſtep further, a third mortgagee, or a ſubſequent purchaſer (for the principle is the ſame as to each, a mortgagee being completely a purchaſer at law after his intereſt is become abſolute), takes in a prior ſecurity that covers as well the eſtate in which he has the ulterior claim, as alſo a larger eſtate, on which he has no claim, it having been unknown to him at the time of lending his money that the mortgagor had ſuch an eſtate; he ſhall nevertheleſs hold that on which he had no lien, as well as that which he has expreſsly taken as a ſecurity, until he is ſatisfied his debt. But in all theſe caſes, the moment the eſtate taken in expires, or the ſecurity taken in is ſatisfied, the third mortgagee's right is at an end; if I am right in my conception reſpecting the principle that governs in the inſtances put, the ſecurity acquired, or rather the lien on the lands acquired by ſuch tacking mortgagee, is not in him in reſpect of the equity

of

of redemption, or equitable intereſt, or other intereſt he derives from the mortgagor, but in reſpect of his own money advanced on a defective ſecurity (be the object of that defective ſecurity a mortage, a purchaſe, an agreement for a purchaſe or mortgage, or for a lien upon land, &c.); which advance of money does not, in its equitable effect upon the contracting parties, enable the third mortgagee to annex any equitable title he derives from the mortgagor to the legal title got in, ſo as to extend the continuity of that legal intereſt got in beyond the period to which its exiſtence is limited on its firſt creation, upon the foundation of any intereſt he derives from the mortgagor. The weapon he gets into his hands by getting in the mortgage, is merely a weapon of defence: in truth, he ſhelters himſelf in another man's caſtle, not in his own. He takes nothing from the ſecond mortgagee; he is only enabled to retain what he has got, not from the mortgagor, but from one whoſe legal title is *paramount* to any equitable claim of the mortgagor, and whoſe title *cannot* be ſhaken *at law*.

If this be the true way of putting the caſe, independent of the ſtatute of 4. & 5. William and Mary, let us ſee what alteration that ſtatute makes, or whether it makes any alteration in the principle. The ſtatute (my obſervations whereon I ſhall confine to the mortgage clauſe) enacts, "That if any perſon who ſhall once mortgage lands to any "perſon or perſons for valuable conſideration ſhall again "mortgage the ſame lands, or any part thereof, to any "other perſon or perſons for valuable conſideration, the "former mortgage being in force, and ſhall not diſcover, "&c. *ſuch mortgagor or mortgagors, his, her, or their "executors, adminiſtrators, or aſſigns,* ſhall have no relief "or equity of redemption againſt the ſaid ſecond or after "mortgagee or mortgagees, his, her, or their executors, "adminiſtrators, or aſſigns, upon the ſaid after-mortgage "or mortgages, but that ſuch mortgagee or mortgagees,

"his,

"his, her, or their heirs, executors, administrators, *and* "*assigns*, shall and may hold and enjoy such *more than once* "*mortgaged* lands and tenements for such estate and term "therein as were or was granted and conveyed by the said "mortgagor or mortgagors *against him, her, or them, his,* "*her, or their executors or administrators respectively,*" (LEAVING out the word *assigns*) "freed from equity of "redemption, and as fully to all intents and purposes as "if the same had been an absolute purchase, and without "any power or liberty of redemption." Now it strikes me, that on the fair construction of this enacting clause (which is penned rather obscurely), the legislature did not mean to intermeddle with the rights of subsequent mortgagees involved in this predicament and struggling for a plank to save themselves from sinking; for I conceive that by the first words, the relief or equity of redemption taken away by the statute, is *that* relief or equity of redemption reserved upon the after-mortgage by the mortgagor, which he (*the mortgagor, or his executors, administrators, or assigns*), they, the assigns, standing precisely in the mortgagor's shoes, and claiming the redemption of that second mortgage (that is, voluntary claimants, not claimants upon valuable consideration) shall be barred; and this is evident from the latter part of this enacting clause, for such mortgagee or mortgagees, it is there said (having got possession, for that must be implied), "may hold and enjoy such more than "once mortgaged lands," (against whom?) why, "against "the mortgagor or mortgagors, his, or her, or their *execu*-"*tors or administrators*," (leaving out the word "*assigns*,") and they are to hold how? "*freed from equity of redemp*-"*tion, and as if they had purchased absolutely.*" Well, had they purchased absolutely the equity of redemption, Could they have held against a third mortgagee possessed of a first mortgage? clearly not; for they could neither hold nor enjoy until they got in the first mortgage. *Vide* Case mentioned before, reported Eq. Ca. Abr. 355. 5.)

But

But if the enacting claufe admitted of doubt, the provifo that follows would put it out of queftion, that the ftatute meant to affect only the fecond mortgagee, and the mortgagor's equity of redemption of fuch fecond mortgage: for the provifo enacts, "that if there be more than one mort-"gage at the fame time made by any perfon or perfons "to any perfon or perfons of the fame lands and tenements, "the SEVERAL *late or under mortgagee or mortgagees*, his, "her, or their heirs, executors, adminiftrators, or affigns, "fhall have power to redeem *any former* mortgage or mort-"gages, *upon payment of the principal debt*, &c. to the prior "*mortgagee or mortgagees*, &c. *any thing therein contained* "*to the contrary thereof notwithftanding*." Language could hardly have furnifhed words more clearly evincing, that the fituation of mortgages holding fecurities equally defective at law, and ftanding in the *fame predicament* of having been deceived, were not meant to be affected; the mortgage is only made irredeemable as to the fecond mortgagee without notice, and thofe exprefsly claiming *through him*. But if the words of the enacting claufe and the provifo did not fo exprefsly warrant the propofition I contend for, I fhould fubmit that the *general principles* upon which other ftatutes applicable to this fubject of purchafes and incumbrances, and in refpect of other fubjects of a *fimilar* nature, and having a *like* object in view (*viz. the preventing fraud)*, would warrant me in contending that this ftatute would not have been conftrued to have had the effect attributed to it by the opinions of mr. —— and mr. ——: for I take it to be a clear principle of equity, that ftatutes of this kind only affect *the legal title*, leaving the parties not affected with fraud, and the fubject, open to, and liable to be affected by, *all* equity in like manner as before. Thus, though the regiftering acts declared that deeds and conveyances not regiftered fhould be adjudged fraudulent and void againft fubfequent purchafers or mortgagees, whofe conveyances, though fubfequent, were regiftered; yet,

yet, on the construction of these statutes, it has been held, that a first mortgagee registered may, notwithstanding a mesne mortgage registered, and so I have no doubt that a puisne mortgagee not registered might, defend himself by purchasing an eigne mortgage registered: for such statutes leave the law, except in as much as they expressly alter it, just as they find it; and I take the Case of Stafford *v.* Selby, 2. Vern. 589. 1. Eq. Ca. Abr. 321. 5. wherein lord Cowper refused to assist a second mortgagee claiming an irredeemable estate under this act of parliament of 4. & 5. William and Mary, principally upon the ground that the statute did not concern this equity, when the mortgagor was imposed upon by the second mortgagee (which opinion must have been founded on the ground that the statute left the case open to equity), to be a case in point supporting my construction of the statute: upon these grounds I retain my first opinion, that *M.* and the bond-creditors are safe in their purchase or conveyance for securing their debts, so far as goes to the defending themselves, and holding out *G.* the second mortgagee until the first mortgage and those debts are satisfied; but *P.*'s conveyance to *M.* being in nature of a mortgage, and leaving the estate subject to an ulterior equity in *P.* as to the surplus, the estate will continue subject to that equity, in the hands of all persons affected with notice of *G.*'s title until *G.* is foreclosed; and subject to this observation, I cannot doubt (notwithstanding the great and respectable authorities I am favoured with to the contrary) but that *M.* may safely proceed in the mode prescribed to take the estate, subject, as before-mentioned, to redemption, until foreclosure, notwithstanding the case should fall within the purview of the 4th & 5th William and Mary (should the case even so turn out).

Nov. 30, 1789. H.

No. III.

No. III.

CASE *on a* DEVISE *of* REAL *and* PERSONAL ESTATE *.

"ALL the rest, residue, and remainder of my goods, "chattels, and personal estate that shall remain at "my death, after payment of my debts and funeral ex-"pences, together with all and every my messuages, lands, "tenements, and hereditaments, with their, and every of "their, rights, members, and appurtenances, situate, lying, "and being in or near *L.* aforesaid, or elsewhere in the "kingdom of Great Britain, that I shall be seised of in "fee simple at my death, or have any freehold or estate of "inheritance in, I do hereby give, devise, and bequeath "the same, and every part and parcel thereof, unto my "very good friend mrs. *A. B.* of *L.* aforesaid, whom I "hereby make, constitute, and appoint, whole and sole "executrix of this my last will and testament."

Case on a clause in a will, Whether an indefinite devise (i. e.) unattended with words of limitation, containing the word *hereditament*, &c. will carry a fee-simple, or only a tenancy for life?

N. B. THE will is duly executed.

WHAT estate doth the devisee take in the testator's *lands* under the above devise? Quære.

OPINION. C.

THE devise to mrs. *A. B.* being indefinite, that is, unattended with words of limitation, regularly gives her only an estate for life, if there are not other expressions or dispositions in the will clearly manifesting or implying the testator's intent to give the inheritance. But I do not find in this will any one of those circumstances that are usually ad-

* In No. XXI. of our former volume we gave the OPINION of Mr. PETER WILLIAMS on a point nearly similar to that of the present Case; and we presume it will be acceptable to many of our readers to have an opportunity of tracing and comparing the learned and ingenious arguments and reasoning of two great lawyers on a subject of such general importance.

mitted to have that operation. Here is no introductory clauſe, no charge upon the deviſee, no limitation over to affect the inheritance, nor any general words *diſpoſing* of the teſtator's *intereſt in the lands deviſed*; for though it has been attempted, in ſome caſes, to give ſuch an import to the word *hereditaments*, yet it was denied in the Caſe of Hopewell *v.* Acland, Com. Rep. 168. as well as in a much later Caſe, of which I have a manuſcript report. And in the preſent caſe we ſeem to be precluded from extending the word *hereditaments* to the teſtator's *intereſt in the things ſo deſcribed*, becauſe his ſubſequent expreſs reference to the different intereſts he had in the premiſes before deſcribed, ſhews that the words uſed in the preceding enumeration of the eſtates deviſed, were by him applied merely to the *ſubjects* of ſuch deſcriptions, abſtracted from his eſtate or intereſt therein; and the words in ſuch reference, *in fee ſimple or eſtate of inheritance*, only deſcribe the teſtator's *own intereſt* in the ſubjects of the diſpoſition, and do not ſeem to expreſs or denote the quantity of the eſtate or intereſt *given* to the deviſee therein. The Caſe of Right *v.* Sidebotham, Doug. Rep. 730, and the ſeveral other Caſes therein cited, are very ſtrong againſt diſinheriting the heir by an indefinite deviſe, even under the influence of a general introductory diſpoſition, and diſinheriting legacy to ſuch heir, neither of which occur in this Caſe; and I cannot ſay that I find anything elſe in it that appears to me to afford ſtronger ground for implying the fee than theſe circumſtances would do. It perhaps may be contended, that the deviſe of all the teſtator's lands, &c. that he ſhould be *ſeiſed of in fee-ſimple*, or had *any freehold or eſtate of inheritance in*, is tantamount to a deviſe of all his *lands of inheritance*; under which laſt expreſſion a fee was held to paſs in the Caſe of Whitlock *v.* Harding, Mo. Rep. 873. But it is to be obſerved, that in that very Caſe it is ſaid, *theſe words* went only *to the lands*, and not to *the eſtate therein*, in a ſtrict conſtruction; but that the intent ap-

peared

peared to pass the inheritance, because an estate for life, *after a term of ninety-nine years previously devised therein to the same person*, would have been of no value. And in Hob. 2. and Godb. 207. the devise is stated to have been of *the testator's inheritance*, and is so cited by Holt, 1. Mod. 104. who says, Moor's Report was *wrong*, and that *lands of inheritance* is only *a description of what lands shall pass*. And it is observable, that the import of the words here is included in *every* devise of any other lands than leaseholds; for a devise of any other lands is a devise of lands whereof the testator was seised in fee-simple, or had any freehold or estate of inheritance in. It may also be urged, that in the disposing clause the word *same* may be referred to the words *freehold or estate of inheritance*, which, however, I apprehend would be a *strain* upon the natural construction of the word; for *same* here evidently refers to the several species of property before enumerated, and the words *or have any freehold or estate of inheritance* only express certain circumstances of their descriptions. The words *and every part and parcel thereof* subjoined to *same*, seem to corroborate its natural and regular construction.

Upon the whole, therefore, as I think words are not to be wrested or strained out of their natural constructions to the disinheriting an heir at law, I chuse to incline to the Opinion, that the devisee in this Case takes only an estate for life in the testator's real estates.

July 7, 1786. C.

No. IV.

CASE *on a* SURRENDER *of* COPYHOLD.

A feme covert being possessed of a copyhold estate, granted for three lives, of which she was then the only surviving one, surrendered the same, and a new grant was made thereof for the lives of herself, her husband, and one of her sons, without any trust being expressed thereof in the copy of court roll.—OPINION, Whether this grant should be deemed to be accepted for the advancement of the son? or, Whether he should be deemed merely a trustee for his mother?

A. *B.* held an estate, by copy of court roll, for his own life, and the lives of two other persons (named in the said copy) in trust for him; and having occasion to borrow money, obtained a license from the lord of the manor to demise the premises for twenty-one years, determinable upon the lives in the copy; and in pursuance of that license demised the said premises to *E. F.* for twenty-one years (determinable as aforesaid), by way of mortgage. One of the trust-lives died. *A. B.* afterwards died, having, by his will, devised part of the said premises to his daughter *B. D.* (the then only surviving life in said copy) and the residue thereof to another daughter. The mortgage remained upon the estate at the time of *A. B.*'s death. *C. D.* (who married *B. D.* the daughter of said *A. B.*) after the death of said *A. B.* renewed the said copyhold estate, and added his own life and the life of one of his sons (an infant) in the said premises; but not being able to pay for the renewal without borrowing money (and *A. B.* not being possessed at the time of his decease of personal estate sufficient to answer his debts), obtained license from the lord of the said manor, for himself and his wife, to demise the said premises for twenty-one years; and accordingly they demised the same to the said *E. F.* for securing 300l. and interest (the former term granted by said *A. B.* to said *E. F.* being nearly expired at the time of the decease of said *A. B.*). The mortgage so, as aforesaid, made by said *A. B.* to said *E. F.* was cancelled at the time of said *C. D.* and wife's making the last demise to him; but the money secured by the former mortgage, and the money

paid

paid for the renewal by *C. D.* was the confideration of the laft mortgage. *C. D.*'s fon is not named in the copy *in truft* for his father, and, by the cuftom of the manor, eftates go to the lives in the copies, fucceffively, as they are therein named, except fuch lives are named in truft.

WHETHER *C. D.*'s fon will, in equity, be confidered as a truft-life in the premifes, though he is not fo declared to be in the copy? If not, Will he (in cafe he fhould furvive his father and mother, who are both named in the copy before him) be intitled to take the eftate, difcharged of the fum due upon it, at the death of his grandfather *A. B.* and of the further fum taken up by the faid *C. D.* for the purpofes aforefaid? and, Will that part of the eftate given to *A. B.*'s other daughter (and which fhe now holds for the life of *C. D.*'s wife) be, in equity, fubject to the payment of a proportionable part of the mortgage-money due upon the whole eftate at the death of *A. B.* and which hath been fince paid by *C. D.* and charged upon his part of the eftate only as aforefaid? Quære.

N. B. *C. D.* and wife, for the better fecuring the money lent them for the purpofes aforefaid, have furrendered their eftate and intereft in the premifes to the mortgagee.

THE general rule is, that where a perfon purchafes copyholds for lives, in the name of other perfons from whom no confideration moves, there fuch other perfons are confidered as truftees for the purchafer, paying the fine, though no truft is declared, notwithftanding the cuftom of the manor that the lives in the copy fhall take in fucceffion. *Vide* 2. Freem. Rep. 123. 1. Atk. 385. But it is otherwife if the purchafe is in the name or names of a child or children of the purchafer, efpecially if fuch child or children be an infant or infants, and unprovided for: there fuch purchafe is confidered as an advancement in refpect to fuch child or children, and not as a truft for OPINION. C.

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the parent. *Vide* 2. Vern. 19. Mumma *v.* Mumma, 1. Atk. 386. Taylor *v.* Taylor. And in the preſent caſe, I think the circumſtance of the old eſtate being in the wife, and of a renewal being upon a ſurrender *from her* with her huſband, makes it ſtronger in favour of the child, as it may be preſumed that the mother agreed to ſurrender her eſtate in order to have her child's life taken in for the benefit of that child, and ſuch child may therefore be conſidered as a purchaſer under her. For theſe reaſons I incline to think, that the renewal in the preſent caſe, as to the ſon's life, may be conſidered as an advancement for that ſon; and conſequently, that the father and mother had not power to charge the eſtate or make it a ſecurity further than during their own lives. *Vide* the Caſe of Back *v.* Andrews, Chan. Prec. 1. and 2. Vern. 120. As to the ſecond point, had it reſted merely upon the original mortgage, I ſhould have inclined to the opinion, that the ſecurity of the term of twenty-one years being determined, and the mortgage itſelf cancelled, and a new ſecurity accepted by the mortgagee, no part of the eſtate remained liable under the firſt mortgage. But I think the whole eſtate was liable upon another principle; namely, as aſſets in the hands of the executors: for it is held, that as well copyholds for lives as freeholds ſhall go to the executors or adminiſtrators. *Vide* 2. Vern. 264. Rundle *v.* Rundle. Now this, I conceive, muſt be by conſidering ſuch eſtate within the ſtatute 29. Car. 2.; and then they of courſe, by virtue of that ſtatute, are aſſets for payment of debts; and upon this ground I conſider the part of the eſtate deviſed to the other daughter as liable in equity to its proportion of the teſtator's debts, and conſequently of that due upon the mortgage made by ſuch teſtator.

Dec. 7, 1779. C.

SINCE

SINCE I anſwered the Caſe reſpecting the copyholds, I have met with a manuſcript note of a Caſe in 1770*, determined by the then lords commiſſioners of the great ſeal, wherein they held, that a copyhold taken in the names of children was not an advancement but a truſt for the father. Their determination ſeems to have been grounded principally on the *leaſes* granted by the father, which they ſeem to think rebutted the implication of his intending it as an advancement for the children. I doubt how far the general concluſion would hold againſt the many prior reſpectable authorities; but I think the Caſe warrants me in altering my Opinion upon the preſent Caſe, ſo far as to think *E. F.*'s ſecurity good againſt the eſtate for life of the ſon (whether that be conſidered as an advancement or not), after the anſwering of the debt ſo ſecured, eſpecially if there is any proof of the application of any part of the money in obtaining that renewal in which the ſon's life comes in. Further Opinion.

London, Dec. 9, 1779. C.

* See Dickinſon and Shaw.—Copyholder for three lives. Firſt life paid the fine, and, according to the cuſtom of the manor, was intitled to all the benefit, the other two lives being only truſtees for him. The defendant was the ſurviving life, and had by perſuaſion got poſſeſſion, but was decreed to account to repreſentatives of firſt life, and ſurrender the eſtate accordingly.

No. V.

CASE *on a* REVOCATION *of a* WILL.

A testator by his will charged his real estate with the payment of his debts; but it being necessary, to give effect to his will, to suffer a recovery of part of his estates, and levy a fine of other part thereof, he executed a lease and release for making a tenant to the *præcipe*, and covenanted to levy a fine; the uses of which fine and recovery he declared to himself in fee. The same was completed in the testator's life-time; but before the summons in the recovery was made out, he died, without having republished his will, he having been in a great measure prevented by the means of the husband of his heir at law.—OPINION, Whether the recovery was complete at the death of the testator? and, Whether the fine and recovery, under the special circumstances of the Case, amounted to a revocation of the will?

J. W. being dangerously ill, on *Friday 2d February* instant duly made and published his last will, and thereby charged his real estate with the payment of his debts. It being thought necessary for him to suffer a recovery of the greatest part of his estates, and a fine of other parts thereof, in order to effectuate the devises in his will, he on Wednesday the 7th executed a lease and release to make a tenant to the *præcipe* for suffering a recovery, and a covenant to levy a fine, the uses whereof were respectively declared to himself in fee. He then gave his warrant of attorney, and acknowledged the fine before commissioners. The tenant appeared *at bar the 8th*, and the fine was on *that day* passed through all the offices and completed. The testator fully intended to republish the will he had before made, after the return of the summons; but he unfortunately expired early on the morning of Saturday the 10th instant, not having effected his intention, without issue, leaving a widow and a sister (the wife of *J. L.* esq.) his heir at law. His personal estate is very inconsiderable, and not nearly sufficient to satisfy his specialty debts.

THE entry was returnable the *first return*, it is now at the alienation office, the king's fine is paid, but the attorney-general's hand is not procured, the summons is not made out; but if it is, it will of course be returnable *Friday the 9th, the fourth return*. The vouchee died about two o'clock on Saturday morning, the *day after* the return day.

WILL

WILL the recovery in its present ſtate, and if nothing further is done therein, the ſummons not being made out, and the fine (which is completed), be deemed a complete and perfect recovery? and, whether it be a complete recovery or not, Will it be deemed a revocation of the will, as to the eſtates therein reſpectively compriſed? or, Will the execution of the deeds to make the tenant to the *præcipe*, and the covenant to levy the fine, amount in law to ſuch revocation? or, Can it be ſaid (the term being eſteemed one day in law) that the recovery (ſuppoſing that it is now perfect) ſhall have relation to the firſt day of the term, and therefore ſhall not overturn the will which the teſtator (as can be clearly proved) fully intended ſhould be carried into execution? 1. Quære.

I APPREHEND the recovery cannot be complete and effectual, if nothing further be done in it, the ſummons not having been made out, nor any writ of *ſeiſin ſued* or executed; for till execution of the judgment in a recovery, it is held to be of no force or validity. *Vide* 1. Wilſon, 55. But, I take it, the fine and the conveyance for making the tenant to the *præcipe* for ſuffering the recovery, are in law revocations of the antecedent will, as to the lands reſpectively compriſed therein. (*Vide* Diſter *v.* Diſter, 3. Lev. 108. Lord Lincoln's Caſe, 1. Eq. Ab. 411. Marwood and Turner, 3. P. W. 163. Darley *v.* Darley, 3. Wilſ. 6. and the Caſes and principles referred to by lord Hardwicke, 2. Atk. 803.) The ſaid conveyance and fine, I underſtand, were clearly *ſubſequent to the will*; and therefore the relation of the recovery to the firſt day of the term, could it be ſupported, I apprehend, would not prevent the revocation effected by them. But no ſuch relation could, I think, have been admitted, had the recovery been perfected; for judgment cannot be given till *after the day on which the writ of ſummons muſt be returnable*, OPINION.

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the vouchee appearing by attorney. *Vide* Wynne v. Wynne, 1. Wilf. 42.

When mr. *W.*'s illnefs became alarming, his brother-in-law, mr. *L.* came to his houfe, bringing with him his wife and daughter. Mr. *W.* fent for an attorney in his neighbourhood to make the will above-mentioned; but it was with difficulty he got admittance to the teftator, mr. *L.* ufing every endeavour to prevent any perfon from feeing him on bufinefs. On *Wednefday the 7th*, when the attorney came with the deeds and warrant of attorney, mr. *L.* afked him what bufinefs he had there, and told him he knew there was fome dark under-hand work going on, and that he fhould not fee mr. *W.*; and it was not till after the *teftator* fent word to mr. *L.* that *he was ftill mafter of his houfe*, that the attorney could have accefs to him. While the deeds were executing, mr. *L.* his wife and daughter burft into the room. He told the teftator he was a dying man, fhewed him his fifter and niece, faid they were his flefh and blood, that it would be a moft enormous crime to difinherit them, with many other expreffions equally violent. This conduct, as it may be imagined, greatly agitated and terrified the teftator, who was in the laft ftage of a very rapid decline; and there is but little doubt it haftened his diffolution. The attorney, on Friday evening the 9th inftant, attempted to go into mr. *W.*'s room, in order that he might republifh his will, but was prevented by mr. *L.* coming up, and declaring he fhould not fee him without his being prefent; and as mr. *L.* with his wife and daughter had before broke in upon the teftator and terrified him moft exceedingly, mrs. *W.* and a female friend would not rifk the agent's going into the room with *L.* fearing his turbulence might occafion mr. *W.*'s *immediate death*, and when the attorney was gone, mr. *L.* *immediately locked up the back ftair-cafe and doors* to prevent his coming near the teftator, who ex-

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pired about two o'clock on the Saturday morning the 10th instant. Mr. *W.* throughout the whole course of his illness, and to his last moments, was perfectly sensible; and declared, that the express intent and purpose of the recovery was, that he might be able to pass his lands by his will: and the attorney has no doubt, if mr. *L.* had not been in the house, he should have found no difficulty in getting the will republished; but he guarded the room-door like a prison. The day after mr. *W.*'s death, mr. *L.* had a minute of the recovery in his pocket, and told the attorney he knew of it as soon as he did it; there can, therefore, be but little doubt that he took those brutal measures to prevent the republication of the will, his wife being the testator's heir at law.

If you should be of opinion that the will, as to the real estate, is in law revoked by the recovery and fine, Will not a court of equity, considering the above circumstances, establish the will, as there is no doubt but the testator would have republished it, had he not been thus prevented by mr. *L.* and who, in right of his wife, will be a considerable gainer by mr. *W.*'s intestacy? 2. Quære.

THE Case of Marwood *v.* Turner, cited in my Answer to the First *Quære*, is an instance of a recovery suffered by tenant in tail to the use of himself in fee, being held, *even in equity*, a revocation of his will respecting the same lands. And lord Hardwicke, in the place I have above cited, after stating the common Cases of revocation, says, "the courts have gone further, and held, that if a man was "seised in fee, and afterwards, thinking he had only an estate "tail, suffered a recovery in order to *confirm his will*, yet "this is a revocation of it." I am not apprised of a Case that goes so far in regard to a recovery suffered immediately after *making the will*, and *avowedly to establish the testator's power of making such will*, in consequence of his being informed it was requisite for the purpose. But after such OPINION.

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an Opinion delivered by lord Hardwicke, it is too much for me to ſay that the deeds and fine in the preſent caſe, though made in ſupport of the will, may not be conſidered as a revocation thereof, *even in equity*. But conſidering that revocations of this nature are not *expreſs* but by *implication*, proceeding on a preſumption, that the teſtator would not have made a conveyance, or altered the eſtate, *without an intention to revoke his will*, as lord Hardwicke himſelf obſerves, 3. Atk. 748.; and that *parole evidence* is admiſſible to *rebut an implication*, *vide* Dougl. Rep. 39. and 40.; I cannot help thinking there is very ſtrong ground in the preſent Caſe for equity to eſtabliſh the will, if there is evidence of what I think the coincidence in proof even affords a preſumption, that the teſtator's declared intent in ſuffering the recovery was to enable him to paſs the lands by his will, and of his meaning to republiſh that will, and of the circumſtances above ſtated reſpecting the behaviour of his brother-in-law in preventing ſuch a republication. Theſe ingredients ſeem to me to diſtinguiſh this Caſe, in an equitable view at leaſt, from all thoſe I have cited, or that have occurred to me on the point, and to take it out of the general reaſons and principles of implied or conſtructive revocations. The teſtator's declared intent in the recovery and fine to eſtabliſh his will in this caſe, the means uſed to prevent his republiſhing it, and the intereſt of the creditors under that will, are circumſtances that ſtrongly concur, in my opinion, to entitle that will to the ſupport of equity againſt the artificial reaſoning on which implied legal revocations are founded.

Feb. 17, 1787. C.

No.

No. VI.

CASE *on a* TERM ATTENDANT UPON THE INHERITANCE.

IN cafes of any difficulty or importance I generally chufe, for the greater fatisfaction of the parties interefted, to accompany my Opinion with the reafons on which I found it. It is with this view that, in delivering an Opinion in the prefent Cafe, I fhall begin with a confideration of the three points on which I apprehend the Anfwer to it muft turn; the refult of which confideration, applied to the particular circumftances, will produce my Anfwer to the Queftion before me. The Queftion now put to me appears, I think, to depend on the following points: Firft, What kind of connection or relation there is between the owners of a term, and of the inheritance that forms their union in equity, or gives the former the quality or capacity of being confidered as attendant on the latter? Secondly, Whether, fuppofing a term to be properly circumftanced in regard to the ownerfhip of it to be attendant on the inheritance, a declaration of truft that it fhall be attendant thereon is requifite to make it fo? Thirdly, Whether if the owner of the inheritance of lands, upon which there are terms attendant in confideration of equity, devifeth thofe lands generally by a will not executed in fuch a manner as to pafs the inheritance, it will fever thofe terms again from the inheritance, and pafs them as perfonal eftate?

OPINION, Whether a term attendant upon the inheritance will pafs by a will not executed fo as to pafs the inheritance itfelf? C.

Points of the Cafe.

As to the firft of thefe confiderations, I do not recollect any Cafe wherein it has been the fubject of judicial difcuffion: my fentiments upon it, therefore, muft be drawn rather from general principles, and the grounds upon which the court of chancery appears to have adopted the union of terms with the inheritance, than upon any particular Cafes or

decifions

decifions upon the very point. The attendancy of terms on the inheritance is originally unknown at law. There, ftrictly all terms, whilft they fubfift, be the beneficial ownerfhip in whom it may, are terms in grofs, feparated from the inheritance as a diftinct and different fpecies of property, becaufe the law in ftrictnefs takes no notice of any ownerfhip diftinct from the legal eftate. But, at law, where the legal ownerfhip of the inheritance and that of the term come to meet in the fame perfon, undivided by any intervening legal eftate in another perfon, there (fave in fome fpecial inftances) a complete legal union, or coalition, takes place; and the term, which before was perfonal property, falls back again into the inheritance, and no longer retains any exiftence diftinct from that. In equity, another kind of ownerfhip arifes into notice; namely, an equitable or beneficial ownerfhip, as diftinguifhed from the mere legal title; for the former is very frequently in a different perfon from that in whom the latter is vefted. This is the cafe wherever one perfon has an eftate vefted in him by the rules of the common law, whilft another is entitled to the benefit and advantage thereof. This latter kind of ownerfhip is the great object of our courts of equity; which, in order to preferve as near a conformity as poffible between the rules of legal and equitable eftates, and avoid the perplexity and inconvenience which would neceffarily refult from the application of two different fyftems of property to the fame fubject, generally regulate the latter by analogy to the eftablifhed rules and regulations which at law govern and prevail in refpect to the former. Now, from this principle of general analogy between the rules of legal and equitable property (which is too well known and acknowledged to need the citation of any authorities to prove it) arifes this conclufion, That where the beneficial or equitable ownerfhip of a term and that of the inheritance meet in the fame perfon, undivided by any intervening beneficial intereft in another

another perfon, there an equitable union takes place, and the term, which before was perfonal property, becomes annexed to the inheritance, and attendant upon it as part of the fame eftate and property, unlefs the owner expreffes his intention to the contrary: for an expreffion or clear manifeftation of a contrary intention by the owner of the property would, I apprehend, prevent fuch union of the term and inheritance; becaufe one great and conftant aim of our courts of equity, in regard to property, is to effectuate the manifeft intention of the parties interefted therein, and who have power to difpofe thereof. Now this attendancy of the term, where no truft is declared for that purpofe, is merely by conftruction in equity; but equity which aims to effectuate, will never make a conftruction contrary to the declared intent of the parties interefted. But fuppofing no expreffion of the owner's intent ftands in the way, but that matter refts quite indifferent in that refpect; then I conceive, upon the principle of analogy above noticed, a conftructive attendancy of the term takes effect of courfe, wherever the beneficial ownerfhip of the term is not divided from that of the inheritance by any intervening beneficial intereft in any other perfon; juft as at law a term generally becomes extinguifhed in the legal inheritance when they meet in the fame perfon, and no legal eftate or intereft in any other perfon intervenes to keep them afunder. Indeed the generality of this conclufion remains to be qualified by obferving, that equity will not make mere conftructive union of the term and inheritance againft creditors, fo as thereby to deprive them of any benefit they would have of the term for payment of their debts; nor will it interfere on behalf of any intervening incumbrance or equitable intereft to prevent the union of the term and inheritance, to the prejudice of a fair purchafer of the inheritance for valid confiderations, without notice of fuch intervening incumbrances or intereft, fo as thereby to deprive him of any ufe he might otherwife make of the term for

for the protecting of the inheritance againſt ſuch meſne claims. But as neither of thoſe qualifications occur for our attention in the preſent Caſe, I think it needleſs to enter into their particular reaſons or diſtinctions. Lord Hardwicke, Villers *v.* Villers, according to a note I have been favoured with of his argument in that Caſe, obſerves, that *terms* to attend the inheritance were invented partly to protect real eſtates, and partly to keep them in a right channel; ſo that by this means the dominion of real property is kept entire. Now I do not ſee that any other than terms ſo circumſtanced as I have mentioned are applicable to theſe ends; at the ſame time that the attainment of thoſe ends manifeſtly requires the attendance of terms when ſo circumſtanced for that protection from meſne incumbrances, and implies of courſe that the ownerſhip of the term and of the inheritance ſhould not be ſevered by any intervening beneficial intereſt in any other perſon known to the owner of the inheritance at the time of his purchaſing it: and the keeping real eſtates in a right channel, and preſerving the dominion of them entire, equally ſuppoſes the ſame coincidence in ownerſhip of the term and inheritance; otherwiſe they could not be made to flow in one channel, nor the dominion of them be kept entire. And wherever the beneficial ownerſhip of the term and the inheritance are not ſeparated by any intervening beneficial intereſt known to the owner at the time of his purchaſing of the inheritance, the attendancy of the term upon the inheritance becomes eſſential to the anſwering the above ends; for without ſuch attendancy, property in the ſame lands united in the ſame owner would take different channels, and the dominion of real eſtates, inſtead of being intire, become ſplit and divided between the perſonal and real repreſentatives; and, indeed, leave the real repreſentatives very little but the mere name of property; for an inheritance expectant on a term of any conſiderable duration is of very little value. So neceſ-

ſary, therefore, is the attendancy of terms, under the circumſtances above-mentioned, to keep real eſtates in a right channel, that the very exiſtence of real property, as diſtinguiſhed from the perſonal, ſeems in a great meaſure to depend upon it: for as there are few eſtates in which there are not ſome ſuch terms, if they are not to be conſidered as attendant, the whole ſubſtance and value of the eſtate would in them devolve to the executor, as perſonal property; whilſt the heir, or real repreſentative, would be left deſtitute of every thing but the ſhadow of the inheritance. In anſwer, therefore, to the firſt of the three points above propoſed, I think we may be ſatisfied with this general propoſition, that the union of the beneficial ownerſhip of a term, and of the inheritance undivided by any beneficial intereſt in any other perſon known to the owner of the inheritance at the time of the purchaſing it, conſtitutes that connection or relation between them which is the ground of the term's being conſidered in equity as attendant upon the inheritance; and that it ſtands indifferent in this reſpect, whether the legal eſtate of the term be in the owner, and the inheritance in the truſtee, or the caſe reverſed; for the connection in the ownerſhip is ſubſtantially the ſame; and conſequently the ſame calls for the attendancy of the term to keep real property entire in one channel, ſubſiſt in both caſes.

THIS brings us to our ſecond point of enquiry, *viz.* Whether, ſuppoſing a term to be properly circumſtanced in other reſpects for attendance on the inheritance, a declaration of ſuch a truſt is requiſite to make it attendant?

NOW, here we may obſerve, that if the protection of real eſtates, or the keeping real property in its right channel, and the preſerving the dominion of it entire, were not deſirable ends, and ſuch as appear intimately connected with ſome general convenience, the attainment of them would be no object of a court of equity, nor would they have operated in that court as a motive for the introduction of terms to attend

the inheritance; which lord Hardwicke, as I obſerved before, aſcribes to them: but if theſe ends were convenient and deſirable, which, I think, is very unqueſtionable (ſee the attention paid to them by our court of equity), it is but reaſonable to preſume every owner of real property to have them in his intention and wiſh, unleſs he declares the contrary; the utility of theſe ends remains the ſame, whether a man expreſſes his intent to attain them or not; and therefore, for any thing that appears to the contrary, the general ground upon which equity conſiders terms as attendant on the inheritance, ſubſiſts in one caſe as well as the other. Indeed, as far as the intention or aſſent of the owner is requiſite to effect or complete ſuch attendancy, it is but equitable to infer it from his ſilence; for it would be injurious to impute to any man a want of aſſent or inclination to what generally appears to be convenient and deſirable, unleſs he expreſſes it himſelf. The owner, indeed, may prevent the conſtructive coalition of the term and inheritance, if for any particular purpoſes he thinks proper ſo to do, and keep them as diſtinct as they were at the time of his acquiring them, by declaring his intention to be ſo; for ſuch declaration precludes all ground for conſtruction in equity, and puts the matter entirely upon the footing of his own opinion, which certainly he has a right to make; and whether it is more or leſs convenient in the end than that which equity would have preſumed for him, is immaterial; for *quilibet poteſt renunciare juri pro ſe introducto.* All this reaſoning in ſupport of the attendance upon terms proceeds on grounds independent of the owner's declaration of ſuch a truſt, and therefore is applicable in its full force to thoſe caſes where no ſuch declaration exiſts: but here is not the ſame neceſſity for our reſorting to general principles for our ſatisfaction on this point of enquiry, as there was in the firſt, becauſe there are ſeveral decided caſes that put this matter out of queſtion,

tion, and are direct authorities, that where a term is, in other respects, properly circumstanced to be attendant, equity will consider it so, though no such trust is declared; and that indifferently, whether the term be in a trustee and the inheritance in the owner, or the term in the owner and the inheritance in the trustee. The Case of Tiffin *v.* Tiffin, 1. Vern. 1. is an instance of the former kind; and that of Douse *v.* Duinsall, 1. Vern. 104. of the latter. Add to this the still later Case of Goodright *v.* Sales, 2. Wilf. 329.; which Case was decided upon the same principle even in a court of law.

This brings us to the last of the three considerations above proposed, Whether a general devise of lands by a will not executed so as to pass the inheritance, will pass terms that are in construction of equity attendant on the inheritance?

And here I think it quite unnecessary to enter into a discussion of the arguments which present themselves on this point, as I conceive the Case Whitchurch *v.* Whitchurch, 2. P. Wms. 236. Gil. Eq. Rep. 168. has sufficiently settled it; in which Case it was held by the master of the rolls, and his decree was afterwards affirmed upon an appeal to the lords commissioners, that a general devise of lands by will not executed so as to pass the inheritance, should not pass a term which in construction was attendant thereon, notwithstanding it was urged as a great hardship, that because all would not pass nothing should, and that equity should interpose to disappoint a will, which at law would have carried the term, and that against a very near, in favour of a very remote, relation. This decision was grounded on general principles, applicable to almost every case of a devise in general words by a will not executed, as required by the statute of frauds to pass lands. They are pretty fully stated in Gilbert's Reports, to which I shall refer for them. Indeed, if this were not the doctrine, the legal solemnities required by the statute of frauds for devising of real estates might soon become useless and obsolete;

ſolete; becauſe, by means of ſuch terms, ſuch lands would eſſentially and ſubſtantially paſs under the denomination of chattels, and leave nothing but the name of the inheritance to the protection of theſe ſolemnities.

THE concluſion, therefore, from our enquiries upon the above three points, appears to be, that wherever the beneficial ownerſhip of the term and that of the inheritance are not ſevered or divided by any beneficial intereſt in a different perſon, there the term is in conſtruction of equity attendant on the inheritance, unleſs the owner prevents it by a declaration to the contrary; and that terms ſo attendant will not paſs by a general deviſe of the lands in a will not executed ſo as to paſs the inheritance to the heir at law.

NOW, to apply this concluſion to the preſent Caſe, we are firſt to conſider, whether there was any intervening beneficial intereſt in any other perſon to divide the beneficial ownerſhip of the term in queſtion from that of the inheritance? and if not, Whether the owner has expreſſed any intention that the term ſhould not be attendant on the inheritance?

IN regard to the firſt, I muſt take it for granted, that there was no intervening intereſt in any third perſon to divide the ownerſhip of the term from the inheritance; for I am told, that the rent reſerved by the truſtees of lady Madox's will upon the terms granted by them to ſir Andrew Chadwick, were afterwards purchaſed by him; ſo that no beneficial intereſt remained in the reverſion reſerved upon thoſe terms out of the original terms from which they were derived: but as I have learnt this only from verbal information, and have not ſeen how or when this rent was purchaſed, my preſent opinion muſt be underſtood to be given ſubject to the reſult of a more particular enquiry into this matter; but at all events I conceive, that that part of the decree above ſtated which determines in favour of the heir at law as to the three houſes which were declared to be attendant, proves that, in the opinion of the court, there was no intervening outſtand-

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ing intereſt between the ownerſhip of the term and of the inheritance, then united in ſir A. Chadwick, ſo as to prevent the term's being attendant; for if there had been, I conceive, the declaration of the truſt to attend could not have made them ſo. Now, therefore, if there was ſuch an union of the ownerſhip of the term and of the inheritance in ſir A. Chadwick as is neceſſary and proper for the attendancy of the former on the latter, it appears from the above enquiries, that in conſtruction of equity they were attendant, unleſs ſir A. Chadwick declares his intention to the contrary; but ſo far from declaring any ſuch intention to the contrary, I think we have ſtrong arguments of his intention that they ſhould be attendant. The conveyance of the inheritance and of the terms in the ſeveral houſes at, or ſo nearly at, the ſame times reſpectively, ſhews that the acquiſition of both was in view at the ſame time, and as conſtituting one purchaſe, and to complete one entire title, to be enjoyed together, and not as diſtinct ſpecies of property. This concluſion is much ſtrengthened by our conſidering, that theſe terms were all future intereſts at the time of his purchaſing them, and ſuch as did not give him a preſent poſſeſſion as divided from the inheritance. The having theſe terms granted to different perſons from the inheritance manifeſts an intent to keep them on foot for protecting that inheritance, which protection implies their attendancy on that inheritance, and going in the ſame channel. And as to the rent and reverſion reſerved in them by the truſtees, it was evidently owing to their being reſtrained to that mode of making a title by the terms of the powers given them under lady Madox's will, which requires the reſervation of rent, and of a reſervation of the inſertion of the uſual covenants. The purchaſing theſe rents afterwards is an argument of his intent to remove, as far as poſſible, every thing that could ſeparate theſe terms from the reverſion, and conſolidating them into one connected title. So far there-

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fore as ſir A. Chadwick's intereſt was requiſite to make theſe terms attendant, I think we have very ſtrong preſumptive evidences of its exiſtence: but from what I have before obſerved, I ſhould not think any poſitive aſſent on his part requiſite to ſuch attendancy; I think it ſufficient that he did not expreſs any negative to it. Upon the whole, therefore, I incline to the opinion, that all the terms in queſtion ought, in conſtruction of equity, to be deemed attendant on the inheritance; and as ſir A. Chadwick has not expreſsly mentioned or deviſed them in his will, or thereby manifeſted any intent to ſever them from the inheritance, or paſs them as perſonal property, but the only words in his will which can be applied to them are generally words expreſſing a manifeſt intention to carry the whole eſtate and inheritance, I conceive, the will not being executed properly to carry ſuch inheritance is not ſufficient to paſs theſe terms, which ought to be conſidered as part of the inheritance; and therefore I cannot help inclining to the opinion, that a rehearing or appeal on the part of ſir A. Chadwick's heir might be reaſonably looked to with expectation of ſucceſs.

January 8, 1779. G.

No.

No. VII.

CASE on an ESTATE in FEE SIMPLE DEFEASIBLE ON LEAVING NO ISSUE.

JOHN DOBIN, of North Petherton, in the county of Somerset, yeoman, by his will of this date (*inter alia*) gave and devised as follows:

July 21, 1726. A testator devised a messuage unto his son *P.* his heirs and assigns for ever; but in case the said *P.* should happen to die *leaving no issue behind him*, then the said testator, after making some intermediate devises, which never took effect, willed that his estate should be sold, and equally divided between his six daughters and *their issue.*—OPINIONS of several eminent Counsel, Whether *P.* took an estate-tail, or a fee determinable upon his dying without issue living at his decease? and, What issue of the daughters were intitled to a share of the produce of the estate?

"ITEM, I give and devise unto my son Philip Dobin, " his heirs and assigns for ever, all that messuage or tene- " ment wherein I now live. But my will is, that in case " my said son Philip Dobin shall happen to die *leaving no* " *issue* BEHIND HIM, that then my said wife shall receive " and take the rents, issues, and profits thereof, and dispose " of the same at her will and pleasure, and shall have, " use, and enjoy all my in-door goods as long as she shall " continue a widow, and no longer; and after her de- " cease, or marriage, as aforesaid, then the lands so de- " vised to Philip as aforesaid, I give and devise the same, " *for want of issue* by him *as aforesaid*, unto my son " James Dobin, his heirs and assigns for ever, chargeable, " nevertheless, with the payment of 50l. a-piece to my " six daughters, and their issue, within a twelve-month " after he shall so enjoy the same. But in case my son " James Dobin shall happen to die *before* my son Philip, " *and the said Philip shall not leave any issue of his* BODY " *begotten*, then my will is, that my said lands shall be " sold and equally divided between my six daughters, " Magdalen Lockier, Mary Mills, Sarah Boone, Eliza- " beth, Rebecca, and Ann Dobin, and their *issue*."

THE testator also gave to his said son Philip, who was his heir at law, all the rest and residue of his estate and effects, and appointed him executor of his will.

PHILIP,

PHILIP, on the 12th of November 1726, proved the will in the archdeaconry court of Taunton, and possessed himself of such part of the testator's estate and effects as were given to him by the said will, and paid the several legatees their respective legacies.

JOAN the testator's widow survived him, but died a few years after.

JAMES the son also survived, *but died in the life-time of Philip*, leaving issue as in the pedigree left herewith.

IN Easter Term 1729, *a recovery* was suffered of the premises devised to Philip, wherein the said Philip and Jane his wife were *vouchees*.

PHILIP died some time in the year 1780; but a considerable time previous to his death he mortgaged the said premises, and afterwards released the equity of redemption thereof.

MARY MILLS, in her life-time, assigned her interest in remainder to James her son, in preference to Michael and Ann his brother and sister, which it is conceived she had a right to do.

CONSIDERABLE doubts have arisen on this Case, as to the nature of the estate which Philip took under the will; and also as to the ultimate division of the property among the daughters of the testator and their descendants. The opinions of gentlemen of the first eminence (mr. Mansfield and mr. Fearne) have been taken, but they differ very essentially on both points. A mr. Letch's opinion has also been taken; who indeed concurs, so far as his opinion goes, with mr. Fearne.

YOU will be pleased to peruse this Case with attention, and advise on the following *Quæres*:

1. Quære. WHETHER PHILIP took an estate in fee simple *subject to be defeated on his dying without issue* LIVING AT HIS DEATH? or, Whether the said Philip took an estate tail with remainders over? or, Whether such subsequent limitations must not be considered as executory devises, supposing

posing the first limitation in fee? and, Whether the recovery suffered by Philip and his wife effectually destroyed such after-limitations, so as to prevent the testator's daughters, and their issue, from contesting the title of the mortgagee or purchasor?

PRESUMING that James took no interest in perpetuity under the will, How far are the daughters of the testator, and their issue, as stated in the pedigree, now entitled under the said will, and in what degrees, shares, and proportions? and, Whether the word *issue* is to be considered as a word of limitation; that is, as intended to give such an interest to the daughters in their respective shares as should be transmissible to their *issue* in the nature of an estate tail, or as a word of purchase entitling the issue by way of remainder after the decease of the parents, or to share with the parents therein? and if the latter, To what issue it extends, whether only to issue born in the testator's life-time, or to issue living at the time of the limitation taking effect, *viz.* the decease of Philip, or to all future issue? *Vide* Alcock *v.* Ellen, 2. Freem. 186. Mr. Fenton is requested to point out *particularly* in the pedigree those who may be entitled to distributive shares of the estate in question. 2. Quære.

UPON the whole, Would you advise, from any probable chance of success, the points to be agitated by two of the descendants from daughters *alone*, the others refusing to concur with them therein? and, Whether the question might not be easily determined by bringing an ejectment in the name of Mary Dobin, the testator's great-granddaughter, who appears to be the heir at law of the testator, against the mortgagee in possession? or, What other mode would you recommend to be adopted to put the matter in issue *at the least expence?*

I RATHER incline to think that the devise to Philip may be construed an estate tail, considering the first limitation OPINION. C.

tation to him his heirs and aſſigns as qualified and reduced by the limitation over *in default of his leaving iſſue.* Had the words been "*die without iſſue,*" or "*die without* "*leaving iſſue,*" or "*leaving no iſſue,*" inſtead of "*leav*-"*ing no iſſue behind him,*" I ſhould not have heſitated to deliver ſuch an opinion under the authorities of Soulle *v.* Gerrard, Cro. Eliz. 525.—Tuttenham, 2. Cro. 22.—Brown *v.* Jervis, *ibid.* 290.—Forth *v.* Chapman, 1. Peere Will. 667.—and Walter *v.* Drew, Com. Rep. 373. And the words "die *leaving no iſſue* BEHIND" do not appear to me to differ ſo much in import from the words "*leav*-"*ing no iſſue,*" as to warrant a different conſtruction, ſo as to make that an *executory deviſe* by force of the latter of that which would have been a *remainder* after an eſtate tail under the former. Beſides, the deviſe ſeems now to reſt on the laſt limitation, that in caſe his ſon James ſhould happen to die *in the life-time of Philip,* "and the *ſaid* "*Philip ſhould not leave any iſſue of his body begotten;*" by which I incline to be of opinion, that Philip's eſtate may be conſidered as abridged to an eſtate tail; and if ſo, it follows, that by a recovery he could bar that eſtate and the remainders over, and acquire the fee ſo as to enable him to mortgage or diſpoſe of the ſame, but not without a recovery. But if the words "*leave no iſſue* BEHIND *him*" ſhould be conſidered as confined to iſſue *living at his deceaſe,* then I apprehend the firſt limitation being to him *in fee,* the limitations over on that event were executory deviſes which he could not bar, and conſequently could not enable himſelf to mortgage or ſell the lands.

See 2. Vez. 615.

3. Quære. IF PHILIP had no power, Then to whom does the eſtate now belong, and what method is adviſable to be purſued, and by whom, for the recovery? As Mary Mills transferred her right to her ſon James, Is he entitled to her ſhare in excluſion of his brother and ſiſter Michael and Ann?

SUP-

SUPPOSING that Philip did not take an estate tail, then the limitations over were executory devises, first to James in fee, but if he died in Philip's life-time, then that the estate should be sold and divided (that is, the produce thereof) among his six daughters and their issue. Now, as James did die in his brother's life-time, the limitation to him, I apprehend, failed, and that for the benefit of the six daughters and their issue took place. Under which a question arises as to the construction of the word "*issue*;" namely, 1. Whether this word is to be considered as a word of limitation, that is, as intended to give such an interest to the daughters in their respective shares as should be transmissible to their issue in the nature of an estate tail? or, 2. as a word of purchase intitling the issue by way of remainder after the decease of the parents, or to share with their parents therein; and if the latter, to what issue it extends? 3. Whether only to issue born in the testator's life-time (as is frequently the construction in gifts of personal property, of which nature the present seems to be so far as respects the interest of the devisees, the lands being directed to be sold and divided among the said legatees)? or, 4. to issue living at the time of the limitation taking effect, that is, the decease of Philip? or, 5. to all future issue? The third and fifth of these constructions I shall lay out of the case, for two of his daughters being unmarried at the time, he could not by "issue" mean "issue living "at the time of his will;" and the division being directed to be made between the daughters and their issue, of necessity supposes the possibility of the *daughters being living* at the time of the division to be made; which if *all their issue* that might be was to share in the division would be impossible, as the number or existence of such issue could not be ascertained till after the decease *of all the daughters*. Of the other three constructions, the first seems to me the most probable; namely, that of the word *issue* being used as a word of limitation, giving an interest in the nature of

OPINION. C.

of an estate tail; for the limitation being to issue generally, with nothing to confine it to issue living at the decease of the daughters, I do not see sufficient ground to consider it as a word of purchase intitling the issue after the decease of the daughters: and I think the construction that the issue should share with the parents is also objectionable, as some of the daughters had no issue in the testator's life-time; and he has expressly directed the division among all his six daughters, without confining it to such issue as should be then living, nor substituting the issue in the room of the parents; and has not confined it to issue in the first degree, *viz. children*, but used the general collective word *issue*, extending to all issue in any degree, under which every child of any daughter, and every child of such child living at the time could claim an equal share; so that one daughter and her issue might eventually sweep away three-fourths of the estate from the rest of the daughters. I observe that the legacies of 50l. given to the daughters in the event of the estate's going to James and his heirs, is limited in the same manner. This, I think, is an additional argument for the construction I have mentioned; for if we consider the issue then to take as purchasors with their parents, the six daughters and their children and grand-children might, together, have become entitled to 3000l. instead of 300l. and their legacies have exceeded twice the value of the estate on which they were charged, so as to have left James not a single farthing from his devise. And this construction is warranted from the Case of Allcock *v.* Ellen, 2. Freeman, 186. Now, under this construction, had the interest of the daughters been in the nature of real property, the heir in tail of every daughter who left issue would have been intitled to the mother's share, or sixth part, and the heir at law of the testator to the shares of the two daughters who died without issue. But the direction that the lands should be sold, I apprehend, should be converted into personal property, as to the gift to the daugh-

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ters and their issue, so as to intitle such daughters to their respective shares of the money arising from such sale absolutely as if such daughter's share had been limited to her and her issue (taking *issue* as a word of limitation), which (as money cannot be entailed, and here is nothing to confine it to issue living at her decease), I conceive, would have vested absolutely in her. If so, each daughter's *personal representatives* are now intitled to her share of the value of the estate, except as to Mary Mills's share, which, under the above construction, I conceive she with her husband, or after his decease she alone, had power to assign to her son James in exclusion of his brother and sister; and I apprehend, as the lands themselves are not devised, but only directed to be sold, the remedy of the claimants under the daughters (supposing them intitled) must be in *equity* by a bill against the vendee of Philip, making the heir at law of the testator, *viz.* James Dobin, the grandson of the testator, the personal representatives and the issue of all the daughters, parties, praying to have the lands sold, and the monies paid to the claimants according to their respective rights. After all, I am aware this Case is so open to different Opinions, that I think it cannot be satisfactorily decided but by the decision of a court of equity.

May 15, 1783. C.

I AM of opinion, that Philip took an estate in fee liable to be defeated in the event of his dying without leaving issue living at his death; and in that event the premises were given to the wife during her widowhood; and after the expiration of that estate to James in fee, if living at the death of Philip, but liable to be defeated in the event of James's dying before Philip; and on that event the premises were to be sold, and the money equally to be divided OPINION. I.

vided among the daughters and their issue. The consequence of this is, that Philip having died without leaving issue at his death, no sale or mortgage by him can be of any effect. James and his issue and heirs have no interest in the estate, because the devise to him was defeated by his dying during the life of Philip. The whole therefore belongs to the daughters and their issue; and though it is not easy to say with certainty what was meant by the word *issue* in the will, or is now to be understood by it, I am inclined to think, that the money which will be produced by the sale of the premises, is to be divided equally amongst the six daughters and the children of each daughter *per capite*, every child of a daughter having an equal share with a daughter; and as some of the daughters are dead, and one child, *i. e.* John the son of Magdalen, is dead, the personal representative of every daughter that is dead, and the personal representative of John, are intitled to the share which such daughters and John would have been intitled to. The grand-children and great-grand-children are not, I think, intitled to any thing. The method to be pursued to obtain a sale and division of the money is, I think, by a bill in equity by all the parties intitled to share against the heir at law, and any purchasor or mortgagee claiming under Philip.

Temple, *December* 13, 1783. I.

OPINION. K.

I HAVE attentively considered this Case, and think, that no certain opinion can be formed upon it, there being no decision exactly in point with the principal question in it, *viz.* What estate Philip Dobin took in the premises? I am, however, upon the whole inclined to be of opinion, that the devise to Philip was a fee-simple, with executory devises over on the event of his dying without issue living at the time of his death. The consequence in this case

case would be, that the subsequent devises would not be affected by the recovery by Philip and his wife. The two Cases in the books that seem most nearly to resemble the present are those of Pells *v.* Brown, Cro. Jac. 590. and Forth *v.* Chapman, 1. P. W. 663. The latter Case was, in effect, a devise of both freehold and leasehold to *A.* and if he dies without leaving issue, remainder to *B.* It was held in that Case, that the devise should have two different constructions according to the different natures of the property devised. In respect to the freehold, it should, for the benefit of the issue, be construed a dying without leaving issue generally, that they might take it on the death of their father; but in respect to the leasehold, as the issue could not possibly take it under that devise, as being incapable of being intailed, the words were restrained to a failure of issue at the death of the first taker, in order to give effect to the devise over. This determination, so far as it goes, makes against the Opinion I have set out with giving; but I do not think it will govern the present Case, there being several material circumstances in which they differ, and which may probably induce a court to give the words "*without leaving issue*," that meaning which lord Hardwicke has on several occasions (all it is true relating to personal property) declared to be their most natural meaning, *viz.* leaving issue at the time of the death; for the devise in this case gives in the first place a fee to Philip, which would enable him to give the estate, or permit it to descend to his issue, if he left any at his death. But in the Case of Forth and Chapman the devisee took only an estate for life, unless the words "dying "without issue" were construed to enlarge the intent, and give an estate tail; so that with this construction the issue could never have been benefited by the devise. I do not lay much stress in this case on the words *behind him* after the words *leaving no issue*, as they *may* be construed to extend to an indefinite failure of issue as well as the other words

words "leaving no iſſue;" though I think they rather ſtrengthen the former words, as their natural meaning is alſo relative to the time of the deceaſe. But in the preſent liberal diſpoſition of courts of juſtice, the beſt reaſon for expecting the deviſes over to be conſtrued executory deviſes, is, I think, that it beſt ſerves the intention of the teſtator; for if the deviſe to Philip is held to be an eſtate tail, Philip might (and he in fact did) gain the abſolute dominion over the eſtate, and by that means had it in his power to defeat, not only the deviſes over but the intereſts of his children. But on the other conſtruction, the deviſes over being executory would not be at all in his power, and would therefore at all events be ſafe; and though the intereſts of his children would be in his power, yet as he could make no diſpoſition of the eſtate in his life but what would ceaſe if he left no iſſue living at the time of his deceaſe, his power of diſpoſing would be, in fact, more fettered and difficult, and conſequently the temptation to defeat his children leſs than if he was tenant in tail, when by ſuffering a recovery he would have a full and abſolute power of diſpoſition. And as I think the inclination of the court would lead to this conſtruction, ſo I think the Caſe of Pells *v.* Brown would juſtify it. That was a deviſe by a teſtator to his ſecond ſon and his heirs for ever, and if he died without iſſue living, William his brother, then to William in fee; and this was adjudged to be a good executory deviſe to William. So in the preſent Caſe, the deviſe being to Philip and his heirs for ever; and if he dies leaving no iſſue behind him, then to the teſtator's wife during her widowhood, the deviſe to her muſt take effect, if at all, *on Philip's dying without iſſue, ſhe being then a widow*; which ſeems to bring it very near both the words and the reaſon of Pells *v.* Brown.

I CANNOT help conſidering the words *and the ſaid Philip ſhall not leave any iſſue of his body begotten*, in the clauſe

clause introducing the direction to sell, as a repetition, but not so fully expressed, of the first contingency of Philip's dying leaving no issue behind him, and consequently as bearing the same construction; it seeming natural, when the meaning is once fully expressed, not to be so attentive to accuracy in repeating it. Besides, as the devise to sell is subsequent to the devise to the widow, and to take place after her death, as well as that of James, if the devise to her was an executory devise, it seems to me that the devise to sell must also be considered as executory to make the will consistent. It appears to me that all the different devises were intended to take effect in succession; and if the devise to the widow would have been an executory one if the event had happened on which she was to take, Philip could not have an estate tail at the death of the testator when she was living; and I do not see how her death afterwards could possibly change his interest into an estate tail.

I do not see any objection to the questions in this Case, so far as they respect the persons claiming under Philip, being tried in an ejectment to be brought by the heir at law of John Dobin the testator; for if the estate ought now to be sold for the benefit of the persons claiming under the testator's daughters, the legal estate must, I conceive, be in such heir at law. But this will not decide the question between the daughters themselves and their representatives.

As to that question, I think it must be considered as a bequest of personal property to them, but the manner in which it is to be divided between the daughters and their issue is, I think, very doubtful. According to mr. Fearne's construction, such daughters became absolutely intitled to the whole interest in one sixth part of the money to arise by the sale, by which the issue would not take any interest whatever under the will. The Case from Freeman certainly

tainly proves what it was cited for, *viz.* that a bequeſt to children and their iſſue may operate as or in the nature of words of limitation, *i. e.* give them the abſolute intereſt in the thing bequeathed. But there ſeems to me a difference between that Caſe and this, which I ſhould think is material, *viz.* in that there was no intermediate bequeſt, but the diviſion was to be made at the teſtator's deceaſe; but here the diviſion was not to take effect till the happening of a future event; and the conſtruction of the will muſt, according to all the caſes and the reaſon of the thing, be made as relating to that time. Now it appears to me, that the word *iſſue* in this Caſe was uſed by the teſtator for the purpoſe of ſubſtituting the children in the place of their parents, if they died before the diviſion; and as the word *iſſue* is, in caſes of perſonal property, either a word of purchaſe or of limitation, as the intention of the teſtator requires, it ſeems to me that it will beſt effectuate that intent in this Caſe to give it the former conſtruction; and I am not aware of any deciſion that will tie up the courts on this occaſion from giving it any meaning which they may judge the moſt proper for this purpoſe; and I ſhould think that would be to make the children ſtand in the place of their parents, and conſequently to take *per ſtirpes*. I am therefore of opinion, that the iſſue of each of the daughters are intitled to the ſhares of their parents, and conſequently that the aſſignment by Mary Mills did not paſs any intereſt to her ſon James.

Temple, 20*th Jan.* 1785. K.

OPINION. I.

I AM rather inclined to think upon this Caſe, that Philip did take an eſtate in *fee ſimple*, becauſe if the deviſe to him were conſtrued to be an eſtate tail, the word *aſſigns* muſt be altogether rejected in the limitation for repugnancy;

tancy; and therein this Case differs from many of those wherein a general limitation to the heirs has been restrained to mean an estate tail when followed by the condition of the devisees dying without issue and a devise over. But though I am of opinion that Philip did take an estate in fee, yet I am inclined to think, upon the most mature consideration, that the limitation over of the sale of the estate, &c. is not good as an executory devise, for that the expressions of Philip's happening to leave no issue behind him must be understood of a general failure of issue in this Case, and not confined to a failure at the time of his decease. It is true, that these words have been interpreted so to mean in certain Cases; but they are leaseholds or chattels, as in Forth and Chapman, 1. P. W. 663.; and there it is expressly stated, that in a devise of freehold, even in the same will, they should receive a different construction as applied to the one and to the other species; and accordingly in the Case of Walter *v.* Drew, in Com. 373. words very nearly similar to the present were determined not to be restrained to a dying without issue at the time of the devisee's death. Indeed, in some cases, when the executory limitations over have been such as from their nature, or from certain expressions to be collected from the will, shewed an intention in the testator to mean a dying without issue at the time of the decease of the devisee, or the like, the court has laid hold of those expressions so as to confine it in order to effectuate the devise; but in this will I cannot see any circumstances of that kind, and the distribution of the purchase-money to the daughters and their issue has manifestly a contrary tendency. These are therefore my sentiments; at the same time I confess there may be a doubt raised of no small magnitude; and that is, that if by reason of the word *assigns* it becomes necessary to construe the first devise to be a fee simple, all the reasoning upon which the distinction between the application of

the words *leaving no issue*, &c. to freehold and to personalty is founded, would apply to construe this as in the case of a chattel to mean a failure of issue at the decease of Philip, that is, because the prior estate cannot be an estate tail, nor the posterior one a contingent remainder; yet this does not appear to me conclusive enough to pronounce this good as an executory devise.

If the parties are, however, disposed to try the question at law, I think it might be done by an ejectment, making the heir at law of testator plaintiff (for he is in equity a trustee for the sale, admitting the disposition to be good): however, if there be any doubt of proving the pedigree, there might be another demise in the name of Ann, the daughter of James, great-grandfather of testator; and if a fine hath been levied, it is necessary that an actual entry should be made and proved in order to avoid the fine.

Some question might arise (admitting the devise over to be good), Whether the premises ought to be considered as personal estate under the authority of Doughty *v.* Bull, 2. P. W. 320. and therefore distributable among the personal representatives or next of kin of the six daughters? and therefore the six children of William Lochier are, I conceive, intitled to the share of their father, or more properly their grandmother Magdalen, that is, her sixth among them; so in like manner among the descendants of Mary Mills, Elizabeth Porter, and Ann Irwitt; but as to the shares of Rebecca and Sarah, I conceive the grandchildren of Magdalen Lochier are also intitled to the father's share, together with their other nephews and nieces, including the children of Hugh and James respectively: but I conceive there is no foundation in this Case for distinguishing between the issue of the daughters born in the life-time of the testator, or living at the decease of Philip, or not; for if it be considered as personal estate, the limitation

mitation to the iſſue as ſuch is void. But this is only a ſecondary queſtion, being of opinion as I am againſt the legality of the deviſe over upon the former ground.*

Clifton, *May* 23, 1786. L.

* On a Caſe ſent out of Chancery for the Opinion of the Judges of the Court of King's Bench, it was held, that PHILIP DOBIN took in fee ſimple defeaſible on the event of his leaving no iſſue living at the time of his death.

No. VIII.

CASE *on the* GRANT *of a* PERPETUAL POST OBIT ANNUITY; *with the* OPINION *of an* EMINENT LAWYER.

C. having contracted to grant a perpetual annuity after the death of his father, charged upon the whole family estate, and secured by extensive powers, for an inadequate consideration—OPINION, That the same was improper; and that C. in equity would be only debtor for the money advanced and interest.

THE honourable mr. *C.* having agreed with *F. W.* esq. for the consideration of 4,300l. to grant him a perpetual annuity or rent-charge of 300l. issuing out of a sufficient part of the estate, lands, and tenements which mr. *C.* is now in possession of, or shall be entitled to, at the death of his father the lord viscount *C.* in case mr. *C.* should survive his father, the first half-yearly payment to become due at the Lady-Day, or Michaelmas, which should next happen after the death of lord *C.* but if mr. *C.* should first die, then the grant of the annuity to be void; mr. *W.* has agreed with mr. *B.* one of his partners, to advance 1,900l. part of the said sum of 4,300l. on the terms in the deed of the grant of the said annuity mentioned and recited, and the sum of 4,300l. has been actually advanced to mr. *C.* upon his engagement to secure the said perpetual annuity of 300l. as before mentioned.

THE deeds being engrossed, and mr. *C.* required and expected to execute them last Friday morning, he is desirous of having mr. ———'s opinion; *Whether the covenants are proper and reasonable?* and, Whether he will not be tied up and put to more inconvenience through the deeds than seems necessary for the grantee's security? and, particularly, Whether the power of entry should be *without impeachment of waste?* and, Whether in the covenant for further assurance it is proper and necessary for him to covenant to levy and suffer the fines and recoveries particularly mentioned therein at his own expence, he never having made any particular agreement so to do? and,

Whether it is not unreasonable and unnecessary, and may not hereafter be very prejudicial to mr. C. to charge *the whole estate* with the payment of the said annuity?

NOTE, There is a defeasance from mr. W. to mr. C. intended to bear date the day after the date of the indenture *tripartite* now laid before you, whereby, after reciting as in that indenture is recited; and also after reciting the indenture itself, it is witnessed and declared, that the said annuity was granted only on condition of the said mr. C.'s surviving lord C. and not otherwise; and that the first half-yearly payment should not be payable but as before stated, &c. &c. &c.

THIS transaction is much marked with the ruin of mr. C. and the oppression of the gentlemen he deals with. OPINION. M.

THE general tendency of it is to anticipate his expectations as heir of a considerable family; and, for the purposes of dissipation, to encumber and mutilate his paternal succession and fortune: I say *for the purposes of dissipation*, because 2,400l. out of 4,300l. is merely of that kind, and the other 1,900l. is to substitute in the place of such another contract, and is made to charge his paternal inheritance for ever, instead of the present charge, which is for lives.

THIS practice is contrary to the first principle of the policy of all governments, by circulating quick ruin amongst the eminent families, and makes above one great head of objection to the validity of the contract before me.

THIS practice is not only exceptionable in a general consideration, as opening the door to rank oppression on one hand, and frequent ruin of considerable families on the other (which last article has a certain and immediate tendency to corrupt the principles of any constitution where it happens), but it is broadly marked with these two qualities in the Case now before me:

FIRST, An annuity in fee is granted for somewhat less

than two-thirds of its real value, following the accounts even of thoſe who tranſact for the purchaſer.

SECONDLY, An annuity of 300l. is made a charge on the whole C. eſtate, which I ſuppoſe is equal to twenty ſuch annuities, and looks more like a large and general tret than a particular charge.

THIRDLY, The eſtate is recited to be under very ſtrict and ſpecial family ſettlements; and there are covenants, for the ſake of this ſingle annuity, to deſtroy all thoſe ſettlements, and convey all thoſe eſtates to the annuitant himſelf at a moſt enormous expence, which is likewiſe to be put in the ſcale againſt mr. *C.*

FOURTHLY, The conveyance of this great eſtate to the annuitant himſelf upon an everlaſting truſt for his own benefit, with a licenſe to enter unimpeachably of waſte, to be done by means of fines and recoveries, makes the manner of this tranſaction ſo monſtrouſly diſproportioned to the end, that it is fit for nothing but to be aſhamed of.

IN my opinion, therefore, the contract is foul, fraudulent, and void; and the bond already given by mr. *C.* is liable to be ſet aſide in equity, as to all but the principal ſum advanced and intereſt upon that.

AND, according to my thoughts, this line of juſtice may well obtain, without any kind of impeachment to the general right of Engliſh ſubjects to diſpoſe of their property as they pleaſe.

ON the contrary, it proceeds upon the ſelf-ſame principle with that right. If it be an advantage to the owner of property to make it eaſily transferrable, it is a further improvement upon that advantage to guard the act of transferring from fraud and oppreſſion. And this is one of thoſe exceptions to a general rule, which prove the rule, by further eſtabliſhing and illuſtrating the principle on which ſuch rule is built.

MY opinion being, that, in equity, mr. *C.* is only a debtor for the money really advanced and intereſt upon that,

I will

I will not employ myſelf in ſuggeſting any other form of contract by which he may ſeem to bind himſelf to more.

July 28, 1764. M.

N. B. In Gwynne and Heaton, Trin. 1778. 1. Bro. Ch. Rep. 1. (almoſt exactly this Caſe) lord Thurlow, Chancellor, decreed the grant of the rent-charge only to ſtand as a ſecurity for the money really paid; the grantor to pay coſts as on redeeming a mortgage.

No IX.

The OPTION: *or, an* ENQUIRY *into the* GROUNDS *of the* CLAIM *made by the* ARCHBISHOP *on all* CONSECRATED *or* TRANSLATED BISHOPS, *of the* DISPOSAL *of any* PREFERMENT *belonging to their respective* SEES *that he shall make* CHOICE *of**.

THE word Option, as applied to this Case, is a term unknown to our law, either civil or ecclesiastical; nor is the term so applied to be found in the archbishop's Registers either old or new. But it has prevailed in common language from the time the archbishops have taken upon them to choose out of all the preferments belonging to the see of a new bishop, what particular benefice they would have, for the first avoidance, as a fee due to them of antient right.

As no archbishop in the Christian church ever claimed this right, excepting the archbishop of Canterbury, and, in imitation of him, the archbishop of York, it is very probable that this claim arose from some right pretended to by the archbishop of Canterbury in virtue of the legatine

* This Tract was written by Dr. Sherlock, bishop of London, in opposition to the right claimed by the archbishop of Canterbury, of nominating the next turn to any preferment he chose on the bishop's removal to the see of London. Dr. Herring, the archbishop, on that occasion had demanded the living of St. George's, Hanover-square, which was resisted by bishop Sherlock, who, however, afterwards compromised the difference by giving up the living of St. Ann's, Soho. On this dispute Dr. Sherlock printed fifty copies of this Tract, of which he distributed forty amongst the judges, civilians, &c.; and being now to be met with in very few hands, is here preserved for the purpose of more extensive information.

power

power from Rome annexed to that fee. That many fuch rights had this foundation, and no other, may be feen from the text of the canon law itfelf; where, fpeaking to the bifhops of England of the archbifhop of Canterbury's power, the words of the canon are, "*Salve licet idem archiepifcopus metropolitico jure audire non debeat caufas de* "*epifcopatibus veftris nifi per appellationem deferantur ad* "*eum*, Legationis tamen *obtentu univerfas quæ per ap-* "*pellationem vel querimoniam perveniunt ad fuam audien-* "*tiam, audire poteft & debet, ficut qui in provinciâ fuâ* "vices noftras *gerere comprobatur.*" So that this, and fome other like powers, belonged not to the fee of Canterbury but to the archbifhops, merely as the pope's delegates.

But, That the archbifhop had by antient ufage a cuftom, whatever the original of it was, to claim a preferment from the new bifhop for a clerk of his own, fhall be admitted.

The queftion then is, What this antient right was? And this can only be learned by the practice; and what that was, appears in the Regifters of Canterbury.

In the Regifter of archbifhop Winchelfey, who came to the fee in 1294, are the following entries:—"*Item eodem* "*anno* (1308) *contulit* gratiam *Domini Walteri Reginaldi* "*Epifcopi Wigorn. quam tenetur facere* RATIONE CONSE- "CRATIONIS SUÆ, *Domino G. de Bruton* *." WINCHELSEY 1294.

The like *gratia* from the bifhop of Exeter (who was confecrated 12th October 1309), upon account of his confecration, is entered in the fame words. The bifhop was Walter de Stapleton. It is evident from thefe entries, that what is now called *an Option* was then called the *gratia*, or free gift of the new bifhop to the archbifhop or his clerk, *ratione confecrationis fuæ*, as a kind of prefent to the

* N. B. G. de Bruton was the clerk named by the archbifhop to be preferred by the bifhop of Worcefter.

the archbishop on account of his trouble in the consecration. Now what was given and accepted *ex gratiâ*, was not demandable *ex debito*. But those free gifts came at last to be considered as the archbishop's right; in the same manner that Papal provisions were introduced; which began under the notion of favours granted to the Pope.—"*Non enim imperiosis istis diplomatis terrebant statim episcopos, et ad sibi parendum cogebant, sed ut leviter primum tentarent eorum patientiam, literis monere eos ac rogare solebant, sed cum preces & monita gravatè ab episcopis reciperentur, ac plerumque ea contemnerent, mox in præcepta conversa sunt.*" Duarenus de Beneficiis, L. 5. C. 8.—These sort of prayers are properly enough stiled by the lawyers *preces armatæ*.

WHAT is to be understood by *gratia* in the Register, may be best explained from the archbishop's Registers themselves. Among the titles for orders, we frequently find chaplains of noblemen ordained with no other title than the promise of the nobleman to provide for them; and in this case the entry is, that such a one was ordained *ad gratiam domini sui*. The archbishop's own chaplains are sometimes ordained *ad gratiam domini*, without other title, in all which cases the reliance is upon the free favour of the patron.

THERE is another instance of what is now called an Option in the same Register (Winchelsey's), as appears by a letter of the archbishop to the bishop of *Ely*, in which he states his right of nominating his clerk to him, *ratione* CONSECRATIONIS *suæ*. The archbishop accordingly nominates the then dean of the arches to be promoted to a benefice suitable to his merit, *quam cito se facultas obtulerit*; and till then to be allowed a pension, *honori vestro & personæ ipsius congrua*.

LIKE instances appear in the Registers of other dioceses. The following are taken from an old Register of the bishop of Bath and Wells:

Ex

Ex Registro JOHANNIS DE DROKENESFORD*.

MEMORAND. quod sub datis London 6 Idus Novembris anno domini MCCC decimo dominus episcopus concessit domino Petro de Eston clerico domini Cantuariensis† archiepiscopi, contemplatione ejusdem patris, quinque marcas annuæ pensionis in festis Pasch. & Sancti Michaelis annis singulis de camera episcopi percipiendas, donec sibi per dominum episcopum provisum fuerit de beneficio competenti.

Ex Registro RODOLPHI DE SALOPIA.

SYMON permissione divina Cantuariensis archiepiscopus, totius Angliæ primas, venerabili fratri nostro Radolpho, Dei gratia Bathoniensi & Wellensi episcopo, salutem, & fraternam in domino caritatem. Cum, de consuetudine laudabili nostrorum predecessorum, tempore hactenus sit obtentum, ac etiam a tempore, & per tempus cujus contrarii memoria non existit, laudabiliter usitatum, quod quiscumque in episcopum cujuscumque cathedralis ecclesiæ, nostræ Cantuariensis ecclesiæ electus, qui per archiepiscopum Cantuariensem in dicta ecclesia episcopus fuerit CONSECRATUS, *personæ idoneæ, quam idem archiepiscopus in hac parte duxerit nominandam, in sua cathedrali ecclesia, si inibi canonicatus & prebendæ existant, de canonicatu & præbenda, alioquin de alio beneficio competenti providere ac etiam eidem nominato, quousque sibi, sic ut præmittitur provisum fuerit, unam pensionem constituere teneatur. Nos vero jura & consuetudines nostræ ecclesiæ Cantuariensis observare, quatenus nobis est possibile, cupientes, ac promotionem dilecti clerici nostri magistri Laurentis de Falstolf suis exigentibus meritis corditer affectantes, ipsum, juxta consuetudinem prælibatam, vobis, quem nuper in Bathon & Wellen ecclesiarum episcopum* CONSECRAVIMUS, *ad canonicatum &* MEPEHAM, 1328.

* He was consecrated August 1309.

† ROBERT WINCHELSEY, who came to the see 1294, and died 1313.

prebendam

prebendam in dicta vestra ecclesia, necnon ad hujusmodi pensionem, quousque de canonicatu & prebenda in præfata ecclesia sibi per vos fuerit provisum, sic ut præmittitur, obtinendam, duximus nominandum, vosque ad nominationem nostram hujusmodi prædictum magistrum Laurentem, in canonicum & fratrem dictæ vestræ ecclesiæ recipietis, quo circa fraternitatem vestram requirimus & rogamus, quatenus eidem magistro Laurenti prebendam in ecclesia vestra prædicta, cum prius id commode fieri poterit, conferre & assignare curetis, ac quousque sibi, sic ut præmittitur, provisum fuerit, eidem talem pensionem constituere, quæ dantem deceat, recipientemque vobis reddere debeat fortius obligatum, literas vestras patentes sigillo vestro signatas sibi super hoc fieri facientes, et quid in præmissis duxeritis faciendum, nobis per magistrum Thomam de Stowe clericum nostrum quem hac occasione vobis duximus destinandum curetis rescribere sine mora. Dat. apud Maghefeld V. Idus Septemb. anno domini MCCC vicesimo nono et consecrationis nostræ secundo.

R. DE SALOPIA consecrated September 1329. *Radolphus permissione divina Bathoniensis & Wellensis episcopus dilecto sibi in Christo magistro Laurenti Falstolf, salutem, gratiam et benedictionem. Precibus reverendi patris nostri, ac domini, domini Symonis, Dei gratia Cantuariensis archiepiscopi, totius Angliæ primatis, pro te sumus favorabiliter inclinati, attendentesque quod nostris ecclesiis prædictis fructuosus esse poteris in futurum, volentesque te ob hoc munus respicere gratiose, quinque marcas sterlingorum annuæ pensionis de camera nostra, singulis annis ad festum Sancti Andreæ & nativitatis Beati Johannis Baptistæ, æquis portionibus percipiendas, quousque de beneficio ecclesiastico competenti tibi fuerit provisum, tibi conferimus pro præsenti. In cujus rei testimonium sigillum nostrum præsentibus est appositum. Dat. apud Dogmersfeld Sext. Kalend. Octobris anno Domini, &c. et consecrationis nostræ primo.*

1. FROM these instances it may be observed, in the first place, that the archbishop's claim was founded upon *Consecration* only.

2. THAT

2. THAT the archbishop had no choice, or *Option*, but only the naming to the new bishop the person to be preferred.

3. THE new bishop was to be judge of the competency of the benefice and of the pension. This was at first plainly the state of the case.

IN the Register of archbishop Reynolds, immediate successor of Winchelsey, a monition is entered to the bishop of St. Asaph to admit the clerk whom the archbishop had named. In this monition the archbishop asserts his right of naming and recommending a clerk, *cuilibet electo* * *post confirmationem*, to be promoted to a canonry and prebend of his church, *si ecclesia fuerit prebendalis*; *alioqui*, to some other benefice. Which person the said * *electus confirmatus* is to receive and admit, and to promote *quam cito se facultas obtulerit*; and in the mean time to allow him a competent pension.

REYNOLDS came to the see of Canterbury, *anno* 1313.

BUT (as the monition goes on) though the said bishop had at his CONSECRATION made his profession, and taken an oath to maintain the rights of the see of Canterbury, yet that *professionis suæ & juramenti non memor*, he had refused to receive the archbishop's clerk,

So that a bishop *electus confirmatus* was always a new bishop, and to be consecrated.

THE official of London (to whom this monition is directed) is therefore to require the bishop to receive and admit the archbishop's clerk within eight days, otherwise the bishop to be suspended *ab ingressu ecclesiæ*.

1. HERE the right of nominating a person is claimed *post confirmationem*, but not *ratione confirmationis*. And the bishop of St. Asaph was a *consecrated* and not a *translated* bishop; and the archbishop, in this instrument, lays the stress rightly upon his profession at his *consecration*. And though, as the law is now understood, a bishop cannot

* *Electo* is to be understood of a bishop who was to have consecration. For in the case of a translated bishop the stile is *postulato*, and not *electo*; nor had any translated bishop *confirmation*, nor could he have it in times of Popery, from the archbishop. *Vide* Appendix.

not confer the benefices of his see till he has had restitution of the temporalities, yet there are many instances where the temporalities have been restored after confirmation, and before consecration; and, in antient times, it was the general rule of the canon law that a bishop, after his confirmation, could dispose of the preferments of his see. *Decret. de Elec. & Electi Potest.* c. 9. and so *Duarenus*, p. 77. "*Notandum est simulatque quis electus esset & confir-*" *matus, jus beneficiorum conferendorum ei competere, licet* "*nondum consecratus sit.*" This being the law at that time, I suppose it will be easily understood why the archbishop insisted upon a promise *statim post confirmationem*, though the grant itself was ever *ratione consecrationis*.

For bishops, after confirmation, had a power of doing all that the archbishop insisted upon, which was a promise to provide for his clerk, *quam cito se facultas obtulerit*. And as this came to be considered as a fee due to the archbishop for the *consecration* of a bishop, it is not to be wondered at that it should be demanded after confirmation was given. And even to this day it is claimed to be due *statim post confirmationem* *, though it is well known that no consecrated bishop can grant any of his preferments after confirmation, till he has had restitution of the temporalities, which is not now done till after consecration.

2. The archbishop does not demand any particular benefice, but he requires that his clerk be admitted to a prebend, but to no particular prebend by name. He requires a pension in the mean time, but does not take upon him to name the value.

Warham came to the see of Canterbury in 1503.

In Warham's Register there appears a grant to the archbishop by the bishop of St. Asaph (a consecrated bishop). In the preamble to this grant the custom is recited, "*Cum archiepiscopus Cantuariensis jure & consuetudine, &c.*

* This was right in archbishop Reynold's time, when confirmation by the archbishop was always followed by consecration. But continuing that language now is a blunder of the actuary. *Vide* Appendix.

"*cuilibet*

"*cuilibet electo in episcopum post confirmationem personam* "*idoneam nominare possit, quem electus confirmatus tenetur* "*providere de canonicatu et prebendâ in ecclesiâ suâ cathe*-"*drali, si fuerit prebendalis; alioqui, de alio competente* "*beneficio*; and in the mean time to accept and admit, and "to allow him a competent pension." After this recital, the bishop grants to the archbishop "*primam & prox*-"*imam advocationem primæ et proximæ prebendæ, seu al*-"*terius beneficii*, to present a *fit person* for one turn only."

1. THIS is the first grant of a benefice to the archbishop by *deed*. And it is also the first instance where the archbishop takes the benefice to his own disposal, without naming a person for it to the bishop.

2. BUT no particular benefice is granted, but the archbishop is to have the first prebend that fell.

THE reason of this change appears, probably, to have been this: so long as the provision for archbishops' clerks was left to the bishop, there must necessarily arise disputes about the value of the preferment to be given; the archbishop's clerk expecting to be promoted to the best, and the bishop being willing, perhaps, to bestow on him only a moderate one. To avoid this difficulty, it seems to have been agreed on both sides, that the archbishop's clerk should take his chance in the first that fell.

THUS the case stood when Cranmer came to the archbishoprick; and what his judgment then was of the right in question, appears from an entry made in his own Register of the fees due to the archbishop and his officers for the confirmation and consecration of a bishop. In this table of fees, those for confirmation and consecration are distinguished under their respective heads. Those for *confirmation* are first set down: to the archbishop, chancellor, and principal register, in distinct articles. Then follow those for CONSECRATION: to the archbishop, bishops assisting, chancellor, and principal register. Under *this head* is the following article: "*Item, at the consecration*

"of every bishop (by prerogative) the disposition of the "*first prebend that becometh void*, after *consecration* of the "elected, by advowson to be granted to the archbishop." Then follows the fees to the church of Canterbury.

1. THERE can be no doubt but the utmost of the archbishop's claim, and the greatest extent to which it had ever been carried, is here set forth; when the time and occasion of this very particular entry of the fees are considered.

2. THE claim is expresly limited to *consecration*, and therefore cannot be extended to translated bishops.

3. THERE is no pretence for the archbishop's right of chusing a particular benefice, it being as expresly confined to the *first prebend that becometh void after the consecration*.

4. IT is observable, that the archbishop here claims the first prebend, *to be granted by advowson*. A proof this, that he took into his claim whatever there was a colour for claiming. There being but * one instance or † two at most, of any such grant before his time.

THE antient custom undoubtedly was, for the archbishop only to name a person to the bishop to be provided for by him *competenter*, according to his own (the bishop's) judgment.

POOLE, 1555. WHEN Poole came to the see of Canterbury, he laid his custom in the antient way, *viz.* that the archbishop should name and present a clerk to every bishop "statim post con-"firmationem; cui idem electus confirmatus *tenebitur, quam-"primum se facultas obtulerit, in sua ecclesia cathedrali (si "secularis fuerit) de canonicatu & prebenda; si vero regu-"laris, de alio competenti beneficio ecclesiastico providere*; "and in the mean time to accept and admit the said clerk, "and to allow him a pension of 5l. *per annum*;" the first time of naming the value of the pension.

* WARHAM, folio 16. B. 4.

† MORTON, 75. a first advowson is granted to the archbishop, but whether an Option—*Quære*.

THAT

THAT the words *statim post confirmationem* had no such meaning as to bring translated bishops under this custom, appears from what follows in the same deed, where the *foundation* of the grant is expressly mentioned; the grant being made *archiepiscopo consecratori meo.* This grant was made by Thomas Watson, bishop of Lincoln.

THE like was made by John Christopherson, bishop of Chichester; and a prebend in his church becoming void soon, the archbishop presents a clerk to the bishop to be instituted, reciting his title to the patronage *hac vice* to be, that the bishop had "*juxta antiquam laudabilem & legitim.* "*præscriptam consuetudinem hactenus inconcussè usitat. & ob-* "*servat. ac singularem prærogativam ecclesiæ nostræ me-* "*tropol. Christi Cant. intuitu* consecrationis *vestræ nobis* "*impensæ*, given and granted to him, the archbishop, the "advowson of the first prebend that became void.

IT is plain from these instances that *consecration* was the ground of the archbishop's claim, and that the thing claimed was the first prebend that should become vacant where the church was *secularis*, or some other benefice where it was *regularis*.

PARKER succeeded Poole, and understood antiquities and the rights of his see as well as any that went before him or came after him. In his antiquities he has a chapter under the title *Cantuar. Sedis Privilegia & Prærogativæ*, in which he takes notice of this claim in the following words: "*Provinciales sui suffraganei et episcopi tenen-* "*tur singuli aliquem ab archiepiscopo Cantuariensi nomina-* "*tum in bonarum literarum studiis alere & exhibere, donec* "*eidem de competenti beneficio sit provisum. Sed nec in vita* "*solum &* consecrationis suæ tempore *hujusmodi officia ar-* "*chiepiscopo suo tribuunt, sed mortui annulos, &c.*" PARKER, 1559.

HERE the right is said to take place *tempore consecrationis*, and therefore where no consecration is, no such right can be claimed. And had the right at that time been understood to arise from the confirmation of trans-

lated biſhops, as well as from the conſecration of new biſhops, it cannot be ſuppoſed that ſo material a right would have been omitted by Parker.

THE practice in his time, as far as it appears to me, ſeems conformable to the right, as it is here ſtated by himſelf; the grants being made *archiepiſcopo conſecratori meo.* And the inſtances of grants which I have by me, taken from his Regiſter, being ſeven in number, appear to be all made by conſecrated biſhops. But I cannot take upon me to ſay that there are no inſtances to the contrary, the ſearch I have been able to make not having been perfect enough to enable me to ſpeak ſo poſitively.

THUS ſtood the antient cuſtom, as it is eſtabliſhed by the Regiſters. The Popiſh archbiſhops kept to it pretty cloſely; but the Proteſtant archbiſhops ſoon departed from it in many reſpects. And we will now conſider what variations were introduced by them, at what time, and on what authority.

CRANMER, 1533. CRANMER for the firſt nine years followed the cuſtom as he himſelf had laid it down, nothing in his Regiſter appearing to the contrary.

BUT there is great reaſon to ſuſpect, that in the year 1541 an attempt was made to enlarge this right, in the Caſe of William Knyght, biſhop of Bath and Wells, who was conſecrated that year.

IN Oughton's Formulary there is a copy of a grant from this biſhop to the archbiſhop upon his conſecration: in the recital of the cuſtom in this grant, the archbiſhop's right is expreſsly extended to the Caſe of *tranſlated biſhops.* The words in the grant, by which it was attempted, are as follows: "*Quod reverendiſſimus in Chriſto pater Cantuarienſis archiepiſcopus, pro tempore exiſtens, cuilibet* "*ſuffraganeorum ſuorum, in epiſcopum alicujus eccleſiæ cathedralis Cantuarienſis provinciæ, regia autoritate nominato & conſecrato,* vel ab una eccleſia cathedrali ad aliam "eccleſiam regiæ majeſtatis nominatione & authoritate "tranſlato, *ſtatim vel ex intervallo* poſt conſecrationem

"*hujuſ-*

" *hujusmodi, quemcunque virum literatum habilem & ho-*
" *nestum præsentare & nominare valeat, &c.*" Whoever attends to this clause will see how unskilfully *translated* bishops are drawn in; for whoever drew it had not judgment enough to make this new insertion tally with the old form.

ANTIENTLY this fee was due upon consecration, and the words *statim vel ex intervallo post consecrationem* probably stood in the copies from whence this was formed; but when the transcriber had inserted the words that subjected *translated* bishops to the custom, he betrayed himself by leaving the words *statim post consecrationem* standing, which could not possibly belong to translated bishops.

WHENCE Oughton had this deed, I know not. He says he transcribed it *ex autographo*; and probably it came into his hands amongst other papers that he collected for his work. But certain it is, that it never was executed by the bishop, for this bishop's grant to the archbishop is at length in Cranmer's Register. As the bishop might, and I suppose did, reject this deed, though tendered him on account of this and other demands not warranted by custom, this matter probably was contested and the old form restored, and the archbishop contented himself with a grant of the first prebend that fell. The antient claim in this deed is rightly said to be from every bishop electo *confirmato et* consecrato. And this antient language is in every part of it applicable to a new bishop only, and not to a translated bishop; though probably the unskilful scribe meant to insinuate, that election and confirmation were a ground for this claim, as well as consecration. Be that as it will, the new bishop might very safely submit to this form, for *consecrato* being added as a necessary circumstance prevented the claim being carried further than what the antient right was. And the archbishop, or rather his officers were soon sensible this was the case, and that they gained nothing, therefore they very soon corrected their mistake; for in the bishop of St. David's Case, though

he was a new bishop, and to be consecrated, and there was no reason, with respect to him, to enlarge the archbishop's claim upon translated bishops, yet for the sake of making a precedent, which others might the more easily follow, in reciting the archbishop's right in the preamble to his deed, these words are inserted, "that every bishop "shall after consecration, or, * *post* postulationem *aut no-* "*minationem suam ad aliquam ecclesiam cathedralem infra* "*Cantuariensem provinciam, ad quam ipsum episcopum prius* "*consecratum ex regia nominatione transferri contigerit,* "grant to the archbishop," &c. And for security the same is again repeated, and the claim made upon every bishop *per consecrationem, vel* translationem.

The preciseness of this description, and the care in wording it, shew plainly that it was a new claim, and a studied one.

In the year 1550, Thirlby was translated from Westminster to Norwich, and he was the first translated bishop upon whom this demand was put in execution. And in his deed of grant to the archbishop, not only the clause before-mentioned is repeated, but in the granting part he is made to say, "*Sciatis me Thomam Thirlby* trans-"latum *episcopum Norwicensem ante dictum dedisse, &c.*" so careful were the officers at Lambeth to establish this new point: and probably Thirlby's Case gave them an advantage; he had been bishop of Westminster, and the first and only bishop there, and probably had never given an option on his consecration, he having perhaps no benefice to grant.

1. It is to be observed, that this claim to take in translated bishops was first introduced into the deeds of *consecrated* bishops, who, as they could not be immediately affected by it themselves, did the more easily admit it.

* *Postulationem* is another clause of the scribe's. For there was no such thing as *postulatio* in Cranmer's time; and the word had never been, or could be, used before in the Option claim.

2. That

2. THAT this clause was so inconsistent with antient custom, that it dropped in Poole's time, and has never been admitted since. And yet the precedents before made upon translated bishops are still followed, though the present deeds are formed upon the old plan of granting to the archbishop * *post confirmationem*; which antiently denoted only the time when the demand was to be made, but is now construed as if every bishop *only confirmed*, and not consecrated, was bound to make the grant.

BUT it is further to be noted, that how far soever Cranmer extended this claim in this point, yet in other respects he kept within some bounds, and all the grants made to him were only for simple prebends, except in the case of Thirlby, where an archdeaconry was granted; which is the first instance where any dignity had been granted in this way. But it must be remembered, that he had no prebend in the church of Norwich to grant, in which case there was ground from the old Registers to have another benefice.

AND though Parker laid his custom, as Poole and other Popish archbishops had done before him, on consecrated bishops only, yet I find him departing from the antient practice in other respects. For

1. THE old claim was restrained to prebends, or simple benefices, but the deeds prepared by Parker took in *dignities* also, of which there has occurred to me but one instance before, and that in Cranmer's time.

2. THE grants are made to his *executors*.

3. THE new bishops sometimes made these grants for themselves and successors, *pro nobis & successoribus nostris*.

4. AT other times they are made for a term of twenty-one years.

* N. B. In Poole's time, and before Cranmer's time, no translated bishop had, or could have, even confirmation from the archbishop.

As Parker ſet forth what the archbiſhop's right was, and what he might legally claim in virtue of the antient cuſtom, ſo far as the practice in his time went beyond this, that is to ſay, granting a particular benefice for a term of years, &c. or to the archbiſhop and executors, it muſt be conſidered as a private agreement only between him and every biſhop for himſelf. The firſt vacant prebend (which was the archbiſhop's due) might be the richeſt or the pooreſt in the church; and it is very probable that a biſhop to preſerve in all events the beſt prebends to himſelf, and the archbiſhop not willing to ſtand the chance of having the worſt, came to an agreement, one to give and the other to take a certain benefice.

In this method there was no certain rule to determine what that compenſation ſhould be, nor in what manner it ſhould be granted; for every ſuch grant was the voluntary act of every ſingle biſhop, who was judge for himſelf what he would give in lieu of the old cuſtom, and in what manner he would give it. But new biſhops being too modeſt to contend with the archbiſhop, or afraid to provoke one on whom, perhaps, their future hopes and expectations depended, gave way to all the encroachments which have followed*. However, there is not in Parker's Regiſter the leaſt evidence, or in any other either before or after him, that any archbiſhop pretended a right to preſcribe to any of his ſuffragans what they ſhould give in lieu of this cuſtom.

Though of late years a method has been introduced for the archbiſhop by ſome one of his officers to intimate to the biſhop at the time of confirmation what benefice he demands in lieu of his cuſtom; but this ſecret intimation

* In a converſation once with a worthy friend of mine, and one very well acquainted with the modern practice of Options, it being obſerved to him that Dr. Hall, biſhop of Briſtol, had never ſigned an Option Deed, he anſwered, that the conſequence of his refuſal was, that he never had a tranſlation.

has

has not been yet suffered to appear either in the grant itself or in any of the Regifters. The deed, though prepared at Lambeth for every bifhop to execute, gives not the leaft intimation of any right in the archbifhop to chufe for himfelf, but the compenfation made for the cuftom is the pure and voluntary grant of every bifhop tendered for himfelf only. And in all deeds of this kind, from Whitgift to the prefent time, the granting bifhop expreffes his grant to be *in plenam fatisfactionem* of the archbifhop's antient claim; and unlefs it can be fuppofed that a bifhop is to make a compenfation without judging of the value of the compenfation, it neceffarily follows, that the grant of a particular benefice in the prefent way is what the bifhop has a right to make for himfelf, but what the archbifhop has no right to demand: though indeed he has in one fenfe an option either of accepting the compenfation offered him, or of demanding his old cuftom.

AND confidering that each of thefe grants is the act of a fingle bifhop, which can bind nobody but himfelf, what has been done by one, or by a hundred, acting each man for himfelf, can never introduce a cuftom to bind their fucceffors, or entitle the archbifhop to demand that of others by law, which he has always had by voluntary grants only, and fuch grants as could only affect the grantor, and not his fucceffors. But thefe agreements proving very beneficial to the archbifhop, they came foon to be countenanced by introducing a new form of the grant, expreffing the gift of the bifhop to be a compenfation for an old right, and thereby laying a foundation for the archbifhop's claiming a compenfation inftead of his right: and this policy has had its full effect. And when a claufe to that purpofe came in we fhall foon fee.

ARCHBISHOP GRINDAL went on in much the fame way as his predeceffor Parker. GRINDAL, 1574.

THE inftances of grants in his time which I have feen, are all made by confecrated bifhops, excepting one, which had

had ſomething particular in it that may perhaps account for the difference made in his caſe. John Piers was conſecrated biſhop of Rocheſter, and ſo ſoon removed to Saliſbury, that probably the archbiſhop could have no benefit by his Option made upon the ſee of Rocheſter, which might probably be the reaſon that induced the biſhop to make a new grant upon Saliſbury. But here I find it neceſſary to obſerve upon the Regiſters at Lambeth, that it is uſual for the actuary to mention by a ſhort note in the margin what the act relates to: in the preſent Caſe there are ſome late marginal entries expreſſing the grant to be made *ratione confirmationis*, though the deeds are in the uſual form, and not one word to lead the actuary to uſe ſuch language in the margin.

WHITGIFT, 1583. IN Whitgift's time, of nine inſtances of grants I find two are from tranſlated biſhops, but one of them was tranſlated from Ireland, and had no relation to the province of Canterbury before, and therefore might be conſidered as a new biſhop of England. What is more to be obſerved in this archbiſhop's time is,

1. THAT the clauſe by which the biſhop grants *pro nobis & ſucceſſoribus noſtris* is brought in again in grants made to the archbiſhop, though ſuch grants were contrary to law, no biſhop being by law enabled ſo to bind his ſucceſſors; and could they have been maintained by law, they would have been the moſt extravagant grants that ever *were* made, and have given the archbiſhop two, three, or more of the beſt preferments in many cathedral churches at one and the ſame time; for every biſhop muſt have made good his own grants, and the grants of all before him.

2. THE clauſe *in plenam ſatisfactionem* does not appear in his firſt deeds, but came in in his time, and has been continued ever ſince.

3. THIS *ſatisfaction* ſoon came to be a very conſiderable thing; for the archbiſhop obtained a grant of the biſhop

ſhop of St. Aſaph of *three* benefices, and of the biſhop of Exon no leſs than *twelve*, out of which, as they fell, he was to have his choice till he had pleaſed himſelf with one.

4. THE grants in this archbiſhop's time were made for twenty-one years.

1. IN Bancroft's time it came to be the practice to take theſe grants indifferently from all biſhops, whether conſecrated or tranſlated, and ſo it has continued. BANCROFT, 1604.

2. GRANTS in his time were made to the archbiſhop and his *aſſigns* for twenty-one years, and the archbiſhop aſſigned them *over to his clerk as ſoon as made.*

3. THE grants were *pro nobis & ſucceſſoribus.*

4. THE grants were alſo *in plenam ſatisfactionem* of the archbiſhop's antient cuſtom. But that the new biſhop was admitted to have a right to judge for himſelf what ſatisfaction he would make, and that the archbiſhop had no ſuch unlimited power over all the biſhops' preferments as to name which of them he pleaſed, appears clearly, not only from the nature of the tranſaction and the very tenor of the deed itſelf, but particularly from the Caſe of Barlow, biſhop of Rocheſter, entered in this Regiſter.

UPON his conſecration a deed was prepared for him to execute, granting (he having no prebend in his gift) *advocationem cujuſcunque rectoriæ ſeu eccleſiæ parochialis.* But this biſhop having obtained a licenſe to take *in commendam* any living in his own gift, did not think fit to make ſo general a grant, and therefore in another deed entered likewiſe in the Regiſter he grants in the words following: "*advocationem cujuſcunque rectoriæ ſeu eccleſiæ* "*parochialis, exceptâ rectoriâ ſeu eccleſiâ parochiali virtute* "*commendæ per nos eligendâ.*" This probably occaſioned ſome diſpute with the archbiſhop; for the firſt deed which laid hold of all the biſhop's preferments is entered early in the Regiſter folio 36, and in the year 1605, which was the year of his conſecration; but the ſecond reſtraining deed

deed is entered folio 273, and after other deeds bearing date 1610, though the date of the deed itself is made to conform with the time of his consecration in 1605.

ABBOT, 1610. IN archbishop Abbot's time the granting for twenty-one years was left off, but the clause *pro nobis & successoribus* continued.

BUT this archbishop introduced a very extraordinary clause to this effect: that if the first turn of the benefice he made choice of should have been granted away by the bishop or his predecessors, then the second turn should go to the archbishop, and *in casu consimili* the third, fourth, &c. which clause, very much improved and enlarged, is continued to this day.

FROM Abbot's time the grants have not varied much, excepting that it came at last to be understood that a bishop could not by law grant for his successors, and therefore the clause *pro successoribus nostris* has been discontinued.

OBSERVATIONS ON THE FOREGOING ACCOUNT.

IT may seem strange, perhaps, to find in the foregoing account, that the Popish archbishops used this right with moderation, and within the bounds prescribed by the antient custom, and that the Protestant archbishops began immediately, even in Cranmer's time, to extend this right, and to carry it step by step to the height at which it is now arrived. But the reason seems to be, the Popish archbishops were bound by the canon law, and could not do what their Protestant successors have done. For as the antient custom was to name a clerk to the bishop to be preferred by him, they could not at the same time name a particular *benefice*, being restrained by the Council of Lateran, which forbids not only granting but even promising

mising the *beneficium vivi & superstitis hominis**. And though consistently with the canon the first prebend that fell might be granted, yet a particular prebend or benefice could not be granted; nor could the Popish archbishop enlarge this demand, and take in archdeaconries and other dignities, or even parochial livings well endowed. For as to *dignitates & pinguiora beneficia*, even the legates *à Latere*, who were cardinals, were restrained in making reservations upon them; much more so were the archbishops of Canterbury, who were only *legati nati*; and therefore there is no sign that an archbishop of Canterbury ever demanded more than a simple prebend or benefice before the Reformation.

But the Protestant archbishops, being set free from the power of the pope, and not regarding the antient canon law in this respect, were from time to time extending this power; the provincial bishops submitting from time to time, for reasons easy to be understood; and it being indifferent to all others, who probably knew nothing of what was doing; or if they did, they thought it the bishop's concern, and not theirs, to look after the episcopal rights.

The Popish archbishops kept nearly to one form, but the Protestant archbishops followed many; so many, that it is hard to conceive how they can be taken to be a proper foundation on which to build the claim of an antient immemorial custom.

1. That at first the archbishop named a clerk to the bishop to be provided for by him.

2. The first prebend that became void was claimed and *promised*.

* For it was thought an indecent thing for clergymen, like undertakers, to be upon the watch for the death of those whom they hoped to succeed; and indeed it can bring but little comfort to the wives and families of those who are put upon the dead list of Options.

3. A DEED

3. A DEED was introduced to confirm this grant, and the biſhops, who ſaw no real difference between granting by deed or making a promiſe which they meant to fulfil, complied.

4. NAMING a clerk to the biſhop by the arckbiſhop was omitted, and the grant was made to the archbiſhop, who was left at liberty to name whom he pleaſed, though not to name any particular prebend.

5. THE deed at firſt made to the archbiſhop only.

6. THEN to the archbiſhop for twenty-one years.

7. THEN to him and his aſſigns.

8. THEN to him, his executors and aſſigns.

9. THEN a particular benefice by name granted.

10. THEN the grant extended to dignities.

11. SOMETIMES three or four benefices, and in one inſtance twelve ſubjected to this grant.

12. NOT only the firſt turn but the ſecond, third, fourth, &c. to the archbiſhop, in order to ſecure him one in all events.

13. GRANTS were ſometimes for the biſhop, the grantor, and his ſucceſſors.

14. A BARGAIN was introduced between the archbiſhop and biſhop, who grants a benefice *in full compenſation* of the old cuſtom; from which time the old cuſtom has never been heard of but in the preamble of the grants, where it ſtill ſtands, though directly in contradiction to the archbiſhop's claim of chuſing for himſelf what dignity or preferment he pleaſes.

AND now, amidſt all this variety, how are we to fix upon any antient cuſtom to ſupport the preſent practice?

THE greateſt innovation of all, and the moſt unwarrantable, is the ſubjecting *tranſlated* biſhops to this cuſtom; that is, ſubjecting them to pay *conſecration* fees, who have not, who cannot have, conſecration, and who have already paid all the fees when they were conſecrated. It will be juſt as reaſonable to make a tranſlated biſhop pay

for

for the consecration dinner, as to pay this other consecration fee called an Option. And yet, as the case now stands, some bishops have paid this fee for consecration three times, some four times over, and it is remarkable that this is the only consecration fee demanded of a translated bishop; there are other fees which are due from every consecrated bishop, but this of the Option only is demanded of a translated bishop. This shews what the truth of the case is; and if it be remembered how the claim upon translated bishops was first introduced, by inserting it in the deeds to be executed by consecrated bishops who were not concerned or inclined to oppose it; and how soon the clause was dropt again, and that the practice did (one or two instances only excepted) in a manner drop with it till Bancroft's time, there will want little more to prove this to be an usurpation.

But whatever else may be claimed as custom, surely there can be no custom to oblige a bishop to give in compensation for the archbishop's right whatever price the archbishop shall think fit to set upon it; for if all the grants of this sort that ever were made were produced at once, they could form no custom or prescription, but every deed would appear to be, what it really is, the act of him who made it, and binding to himself only, without bringing anybody else under an obligation to follow his example.

As to the claim made now by the archbishop, of naming what dignity or benefice he thinks fit as a compensation for his custom, there does not appear to be any the least evidence to support it; for there is not the least intimation, or the least memorandum of any such right in any of the Registers from Peckham's time to this time. Nor does the present form of the deed made to the archbishop so much as suppose it; but the deed is a tender from the new bishop, and his act only.

THERE

THERE is nothing in this case more extraordinary than the conveying these Options, not only to the archbishop, but to his executors and assigns. If the archbishop himself can claim an Option *jure metropolitico*, does the *jus metropoliticum* descend to his nephews or his nieces? or, Is it for the honour of the see of Canterbury, or for the good of the church in general, that three or four archdeaconries, and as many of the best dignities in the province, should be in the disposal of him, or her, who happens to be next of kin to the deceased archbishop?

THIS was certainly no part of the antient custom, but it came in in consequence of an alteration of the old custom. The antient promises, before grants by deed were introduced, were made to the archbishop and his *assigns* in behalf of such clerk as he named; who was the only *assignee* of the archbishop then thought of, as may be seen in the earliest instance, where it is *dominus contulit gratiam episcopi Wigornensis domino G. de Bruton.* By this act of the archbishop, Bruton became the assignee of the archbishop under that promise. But when the course of things was altered, and these Options were taken by deed, which was a temporal conveyance, and to be construed by the rules of the temporal law, then the grant of the archbishop and his assigns carried the right on by a legal construction to his executors and administrators: the effect of this was not soon perceived.

BUT it was not long before the advantage was taken; and the better to secure it, *executors* and *administrators* were added to the assigns in the grant itself: and by this change things were brought to the present state. When a *deed* was taken in Warham's time, this consequence was not probably foreseen; but as soon as it was seen, the utmost advantage was taken; by which means some of the best preferments taken as Options have fallen into bad hands, and have been made a very bad use of, to the great reproach and scandal of the church.

IT

IT may be wondered at that the provincial bishops should submit to these innovations so much to the prejudice of their sees; especially when the king (who had a like claim upon bishopricks and religious houses) having extended his right beyond due bounds, it was taken away by act of parliament, the words of which are, "Whereas "archbishops, bishops, abbots, priors, abbesses, and pri- "oresses, have been before this time sore grieved by the "king's request and his progenitors, which have desired "them by threats for their clerks and other servants, for "pensions, prebends, churches and corrodies, so that they "might nothing give, nor do to such as had done them "service, nor to their friends, to their great charge and "damage; the king granteth that from henceforth he "will no more such things desire but where he ought." 1st EDW. III. c. 10.

THIS is all the antient evidence of the archbishop's right that has appeared to me, and I believe all the material evidence that can be found to this period. There are in the Registers several instances of the archbishops presenting to prebends and dignities too in the provincial churches; but as they were in virtue of bulls of provision granted by the Pope, they have no relation to the power under consideration.

THE right in this case might be rested upon this comparison, between the claim set up against the provincial bishops of late days, and the antient practice and custom verified from the authority of the Registers of the see of Canterbury. But there is another and a very material point to be considered: How far the claim of an Option, in the manner it is now understood, and has of late years been practised, is consistent with the law of the realm?

CRANMER'S concern to establish and authenticate his own and his officers fees upon the confirmation and the consecration of bishops, was not without reason. He being the first Protestant archbishop, and the first who acted without the character of legate of the Pope, his intention

 might

might seem to be to separate the archiepiscopal rights and powers from the usurped powers exercised by the legate; but he had nothing less in his view. The meaning of his entry was plainly to preserve to his see the antient and accustomed dues, and not to give up any. As his care about his fees extended to those only due upon the confirmation and consecration of bishops, and as the whole form of making bishops was altered the very year that Cranmer came to the see of Canterbury, it appeared probable that this entry in Cranmer's register of fees due to him upon making new bishops, might take its rise from the new acts of parliament relating to that matter. And this upon examination appears manifestly to be the case.

HENRY VIII. came to the crown in April 1509. Cranmer was made archbishop in March, the 24th of Henry VIII. 1533. In January following (the 25th of Henry VIII.) was held a session of parliament, the first that Cranmer sat in, in which session the act against payment of *annates, &c.* and of *the electing and consecrating archbishops and bishops*, passed.

WHEN this act was made, by which the Pope's authority was set aside, and a new method of making bishops was introduced in virtue of the act, the parliament were sensible that the validity of their bishops would be objected to, and their rights contested (such was the temper of the times), for want of canonical election, and other forms thought necessary. To obviate this difficulty, there is an express clause in the act to preserve the authority and the temporal and spiritual rights of the new bishops. This is the clause now to be considered. The words are,

IT was further enacted (speaking of an act made in the 23d of the king, and confirmed in this), "That every "archbishop and bishop named and presented by the king, "&c. shall be accepted and obeyed as other like prelates "of that province have been accepted and obeyed, which "have

" have had their bulls, &c. from the see of *Rome*. And " also should fully and entirely have and enjoy all the spi" ritualities and temporalities of the said archbishoprick " or bishoprick in as large and ample and beneficial a " manner as any of his or their predecessors had or en" joyed." In the new part of this statute (properly the enacting part) the like provision is made for their having and taking all the *possessions* and *profits spiritual and temporal*, as any archbishops or bishops might at any time heretofore do. When the *temporalities* and *spiritualities* of bishopricks are mentioned together, the meaning of the second term is often mistaken, but here I think there is no room for such mistake; for the spiritualities and temporalities in the first part of the act are in the latter part explained to be *profits spiritual* and *temporal*; and those who are at all acquainted with these matters know, that *spiritualities* are the *fees*, perquisites, and *profits* arising from the ecclesiastical jurisdiction of bishops; and distinguished from the rents and profits of lands and manors.

SINCE the making this act, the spiritualities of archbishops and bishops, that is, their fees and perquisites, are confined, as to the rates of them, by the usage and custom which had obtained before the 25th of Henry VIII. As they have a right under the act to take what such antient custom will warrant, so have they no right to exceed or carry their demands further: under this clause the present bishops of England hold their temporal estates, and all their profits and perquisites arising from their spiritual and ecclesiastical jurisdiction, and under this limitation they can no more claim *new* fees than they can claim *new* lands. And let it be remembered, that the bishops being intitled to their bishópricks in as ample a manner as they held them before the 25th of Henry VIII. they cannot now be subject to any new demands from the archbishop or any of his officers. And should any demand for larger fees be made and contested, they who make the demand have no

 other

other plea left but what the ſtatute has given from uſage and cuſtom, as they ſtood before the 25th of Henry VIII.

In the times of Popery the archbiſhops and biſhops had other ways of compelling payment, as is manifeſt in an inſtance taken notice of before. A biſhop of St. Aſaph, who had been lately conſecrated, refuſing or delaying to provide for the archbiſhop's clerk, the archbiſhop wrote to the official to cite the biſhop, and if he did not give him ſatiſfaction to ſuſpend him: the biſhop without doubt complied, for he had no remedy but by appeal to Rome; and the archbiſhops, who were the chief inſtruments of the Pope's power in England, had too much influence in that court to leave a private biſhop any hopes from ſuch an appeal.

But all theſe kinds of proceſs were ſtricken off at the Reformation, and the ſtatute gave another remedy in this and many like caſes, by empowering the archbiſhops and biſhops to take and to recover ſuch temporal and ſpiritual profits as had been by *uſage* and cuſtom appropriated to their ſees.

The caſe being thus, the archbiſhop (Cranmer) and his officers ſaw plainly that there was no way to preſerve and ſecure their rights but by aſcertaining the antient and uſual rights of the ſee of Canterbury due upon the making biſhops. In order to this, and to preſerve the memory of theſe antient uſages in times to come, the archbiſhop and his officers examined into the uſage and cuſtoms of times before them, and made a full and authentic entry of them in the archiepiſcopal Regiſter. It is not to be ſuppoſed that any injury was done to the ſee of Canterbury in this entry, and therefore without doubt all was claimed that was due.

Consider now, Cranmer was preſent at the paſſing the act, and probably chiefly concerned in getting the clauſe to preſerve his own and the other biſhops rights. After the act was paſſed, and whilſt the memory of what had

had been the usage and custom of his predecessors was fresh, he draws up an account, and enters it in his Register, of these *old* and *accustomed* rights; and the Option being entered as a *consecration* fee, must it not be admitted as a decisive evidence of what the antient custom was?

THAT Cranmer acted with this view in the above-mentioned entry in his Register, and understood the antient practice and custom of his see, to be the rule by which all his claims were to be measured, appears manifestly from another act of parliament (in which Cranmer was present) made *anno primo* Edwardi VI. in which there is a clause inserted purposely to preserve the archbishop's right to fees upon making new bishops. This statute of Edward VI. sets aside the *conge d'elire*, the election, and the confirmation of bishops, and made the king's letters patent effectual to all these purposes. Election and confirmation being taken away by the statute, it was natural for all the fees belonging to them to drop with them; but Cranmer, who sat in this parliament, took care of himself. And there is a proviso that all bishops made according to the act shall "pay, do, and yield to all and every person all such fees, "interests, and duties as of old time have been accustomed "to be done." It is manifest from hence, that Cranmer understood, and the parliament understood, that fees due upon making of bishops were not to exceed the old usage and practice.

IN the same act there is another clause of like import relating to the fees of the ecclesiastical court: "Provided "always, that no more or other fees be taken than was "heretofore accustomed." This clause and the former, though one is in the affirmative and the other in the negative, both mean the same thing. The antient practice is the standard in both cases.

WHETHER these clauses have ever been brought into judgment in the king's courts, I know not, but another

of the ſame kind relating to a much higher and more important concern has; and I conceive the judgment given in that great caſe will rule all like queſtions ariſing from theſe clauſes; I mean the proviſo in the act of the 25th of Henry VIII, c. 19. upon which the eccleſiaſtical law of this kingdom is founded. This ſtatute put all the eccleſiaſtical laws under the examination of the king, and thirty-two commiſſioners to be appointed by him. But in the mean time the antient canons and conſtitutions, under ſome reſtrictions, were to be uſed and exerciſed *as they were before the making this act.* The former part of this act for reforming the eccleſiaſtical laws was never carried into execution, and they now ſubſiſt and are executed in virtue of this proviſo. Conſider now what judgments the king's courts in Weſtminſter-hall have given upon this clauſe.

It has been determined, that no canon or conſtitution can be now put in uſe that was not uſed and exerciſed before the 25th of Henry VIII. or otherwiſe than it had been uſed. And the proof is put upon the eccleſiaſtical court to ſhew that the law, upon which any queſtion ariſes, was uſed and exerciſed as they now uſe it, before the act.

Compare now thoſe clauſes, one to preſerve the archbiſhop's ſpiritual profits, and the other to preſerve the law of the church. The firſt ſays, That the archbiſhop, &c. *ſhould have and enjoy* all ſpiritualities belonging to the archbiſhoprick in as large and ample a manner as any of his predeceſſors had; that is, before the making the act. The other ſays, The laws of the church *ſhall be uſed* as they were uſed before the act.

These clauſes are both in the affirmative, and exactly in the ſame ſtyle. The courts of law have adjudged, that the ſpiritual courts cannot go a ſtep beyond the uſage as it ſtood in the 25th of Henry VIII. Muſt not the ſame judgment be made upon the ſame proviſion in the other caſe?

case? or, Must a private right in the archbishop be more favoured and set free from the restraint which binds the general right of the church of England, especially the restraint being the same, and in the same terms in both cases?

UPON the whole, let any man consider this case and the evidence here produced, and then say, By what antient custom or usage, or by what law, or by what equity, the Option, a fee for consecration, is demanded three or four times over from the same bishops, who are and can be consecrated but once?

LET him say too, How it comes to pass that the archbishop, instead of the first prebend that becomes vacant, which may perhaps be but four or five pounds a year, and very probably not above twenty pounds, does now insist upon the very best thing every bishop has to give, and to take dignities and livings of four or five hundred pounds a year, nay of a thousand pounds a year? and this under the notion or pretence of a compensation for the old claim.

APPENDIX.

I THINK it proper here to subjoin the Opinion of an able lawyer, who is now dead. I had the like Opinion of several others, whose names I forbear to mention.

IN the Opinion given by sir John Strange, the late master of the rolls, he seems to differ with me as to the Case of Translated Bishops. The reason of it is, his not being apprised of the process and manner of making bishops; for which reason I have added an account of it, which will enable the reader to judge. I only add here, that

that I had never an opportunity of ſhewing it to ſir John Strange.

"I HAVE peruſed and conſidered the papers put into "my hands relating to what is commonly called the Arch-"biſhop's Option, together with the deed, which I ſup-"poſe was tendered to the biſhop of London to be exe-"cuted by him; from all which I ſee no legal ground for "the claim of the archbiſhop in the extent now contended "for. What the ſtrict right was, appears clearly from the "extracts ſtated, and to this day (with ſome extenſion) "recited in the new biſhop's grants; from whence I think "there can be no doubt but it is in the power of the "new biſhop to refuſe to comply with the demand of "an Option, as it is now underſtood and practiſed, or "to make any other ſatisfaction for the cuſtomary right "than by a ſtrict compliance with that cuſtom. The two "ſtatutes of the 25th of Henry VIII. and 1ſt of Edward VI. "are very ſtrong to prove that the antient right or uſage "before the making of thoſe ſtatutes cannot be exceeded "or varied from; and it is my Opinion, that in point "of law they cannot without the new biſhop's con-"ſent.

"BUT how clear ſoever the new biſhop's right to re-"fuſe to comply with the archbiſhop's Option appears "from the firſt footſteps of the claim, and the nature of "the ſubſequent grants down to the preſent time, yet the "claim upon tranſlated biſhops ſeems to me to ſtand upon "a much ſtronger foundation, I mean the uninterrupted "uſage from archbiſhop Bancroft's time to this day; "and this I think will have great weight: for though "from the accounts that are given of this matter prece-"dent to this time, there are ſtrong reaſons to conclude "that the claim was originally confined to conſecrated "biſhops only, yet the uſe of the word *confirmation* (which "is a circumſtance that occurs in the caſe of a tranſlated "biſhop), and the ſubſequent uſage and expreſſions in the "grants

"grants themselves, incline me to think, that the claim "as to translated bishops being equally liable, with conse- "crated ones to provide for a clerk nominated by the "archbishop, is not now to be got over."

December 9, 1749. J. STRANGE.

I.

The present Method of the Archbishop's making an Option, *together with a* Copy *of the first* Deed *tendered to the Bishop of* London.

WHEN a bishop is to be made or translated, the archbishop by himself, or chaplains, &c. inquires what dignities, prebends, or livings belong to the see to which the bishop is named, and having made choice of the best in value, or the most likely to fall, without consulting the bishop, he orders a deed to be prepared for the bishop to execute, by which the first and next avoidance of the preferment *so made choice of* is to be conveyed to the archbishop and his executors; and some person belonging to the archbishop attends upon the bishop at the time of his confirmation, and requires his consent to the said Option before the confirmation passes.

The following Deed *was tendered to the Bishop of* London.

TO ALL CHRISTIAN PEOPLE to whom this present writing shall come, THOMAS, by divine permission, bishop of London, greeting, in our Lord God everlasting, and undoubted credit to these presents. WHEREAS it has been established by a long antient and laudable custom and prescription, time immemorial, as well as by the peculiar prerogative of the metropolitical church of Christ, Canterbury, and it has hitherto been accordingly practised and

and observed to this very day, without any interruption, for the archbishop of Canterbury for the time being to present and nominate to any of his suffragans chosen bishop of any cathedral church within his province of Canterbury immediately *after* the *confirmation* of such his election, one proper clerk, for whom the said bishop so elected and *confirmed* shall be obliged, as soon as an opportunity shall offer, to provide for in his cathedral church with some *dignity*, canonry, and prebend, or some other competent ecclesiastical benefice, and in the mean time to *admit* and *receive* the said clerk so to be promoted to such dignity, canonry, and prebend, or benefice, and *also* to appoint him a sufficient annual pension to be paid him until such time as the said clerk shall be sufficiently provided for with some *dignity*, canonry and prebend, or such other competent ecclesiastical benefice. KNOW YE therefore, that WE, the said THOMAS, bishop of London, being desirous, as far as in us lies, and as we are obliged in all things fully to comply with the rights, liberties, customs, and prerogatives of the metropolitical church of Christ, Canterbury aforesaid, for the causes and considerations aforesaid, *and in full satisfaction* thereof, have given, granted, and confirmed, and do by these presents give, grant, and confirm to the most reverend father in God THOMAS, by divine providence, archbishop of Canterbury, primate of all England, and metropolitan, *his executors and assigns*, the first and next advowson, nomination, presentation, and free disposition and right of patronage of the rectory of St. George, Hanover-square*, in the city of Westminster, and county of Middlesex, and within our diocese of London, and now in the possession of the reverend ANDREW TREBECK, doctor in divinity, to our patronage and disposition belonging, whensoever and as soon as the said rectory

* N. B. The bishop refusing to make this large grant, it was changed for another.

of

of St. George, Hanover-square, by death, resignation, cession, dismission, permutation, deprivation, or any other manner whatsoever, shall happen to be first and next vacant after the date of these presents; TO HAVE AND TO HOLD the said advowson, nomination, presentation, and free disposition and right of patronage of the said rectory of St. George, Hanover-square, for the first and next avoidance so as aforesaid to the aforenamed most reverend father in God THOMAS, lord archbishop of Canterbury, his *executors* and *assigns*, for one turn and next avoidance only, so as it shall and may be lawful to and for the said most reverend father, his executors and assigns, to nominate and present for one turn only any proper person whatsoever at his and their pleasure, by *authority* of these presents, to the said rectory of St. George, Hanover-square, howsoever it shall happen to be void, and letters of such nomination and presentation to the said rectory of St. George, Hanover-square, to make and grant to any such fit person whatsoever, and to do, exercise, and perform all and singular other things which may be needful, or in any wise convenient in or concerning the premises, or any of them, as fully, freely, and entirely, and in as ample manner and form as We the said bishop could or might do, if this our present grant or confirmation thereof had not been made: and if it shall happen that this Our gift or grant, by reason of some former gift or grant thereof made by Us or our predecessors, or upon any other reason or account, shall not have its due effect upon the first and next avoidance of the said rectory of St. George, Hanover-square, then and in such case We will and grant that this our present gift or grant shall extend to the second, and also in like case to the third avoidance of the said rectory of St. George, Hanover-square, so that the right of patronage of the said rectory of St. George, Hanover-square, *shall not return to Us* until such time as some one proper person by virtue of these presents, upon the presentation

fentation of the faid moft reverend father, his executors and affigns, to the aforefaid rectory of St. George, Hanover-fquare, for one turn only fhall be admitted and canonically inftituted into the fame, and alfo peaceably and quietly inducted into the real, actual, and corporal poffeffion thereof, and all and fingular the rights, members, and appurtenances thereof, or thereunto belonging. In testimony whereof We have caufed Our epifcopal feal to be affixed to thefe prefents, dated the day of in the year of our Lord, according to the computation of the church of England, one thoufand feven hundred and forty-eight, and of the reign of our moft ferene prince in Chrift and Lord, our fovereign lord George the Second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, &c. the twenty-fecond, and of our tranflation the firft.

II.

TO explain what is faid in the foregoing papers, as to the difference between a new bifhop and a tranflated bifhop, it is to be remembered, that all tranflations of bifhops are contrary to the canon law, and therefore a dean and chapter could not *elect* one who was already a bifhop to be a bifhop of their fee; and no difpenfation could be had *but from the Pope* himfelf; and therefore as the chapter could not *elect*, they could only in fuch cafe petition the Pope for a difpenfation, to which petition two-thirds of the chapter were neceffary to be confenting, and this was called a *poftulation*; and the tranflated bifhop was never called *epifcopus electus*, but always *epifcopus poftulatus*.

In thefe tranflations, in time of Popery, the archbifhop of Canterbury had nothing to do, for *confecration* could not be *repeated*; and as there was no election in the cafe there could be no *confirmation*, and the Pope's acts of authority in tranflating a bifhop upon a poftulation of the chapter

chapter were never submitted to the judgment or confirmation of the archbiſhop of Canterbury; and thus the caſe plainly appears to be from the Regiſters of Canterbury.

FOR in thoſe Regiſters, from the beginning of them till the time of the Reformation, there is an entry made, in the caſe of biſhops *elect*, of the *election* by the chapter, of the *conſent* of the new elect to the ſaid election, of his *confirmation* and *conſecration*; but in the caſe of tranſlated biſhops there is no entry relating to them, excepting only of a *mandate* from the Pope to the archbiſhop, reciting that he had tranſlated ſuch a perſon to ſuch a biſhoprick, and requiring and commanding the archbiſhop to deliver the juriſdiction to the ſaid tranſlated biſhop; which juriſdiction had been ſeized, according to cuſtom, by the archbiſhop during the vacancy.

UPON the whole then, as there never was a fee taken by any perſon whatever that could ſtand as a precedent to juſtify the modern claim of an Option, and as this claim muſt be governed by uſage and practice, it is hard to know under whom they claim the preſent practice. For neither the Pope himſelf, who was the prime agent in the tranſlation, and much leſs the archbiſhop, who had nothing at all to do in it, either claimed or enjoyed ſuch a right.

No. X.

Of the PLACES *of* MEETING *of* PUBLIC COUNCILS *of this* KINGDOM, *and of* AFFAIRS *of* PEACE *and* WAR *therein debated**.

Of the places of meeting of public councils.

BRENNUS had ill ſucceſs by following the private counſel of his flatterers; for in his abſence his brother BELINUS had waſted and taken his country. Upon the ſea the king of Denmark, who was in love with the lady, met him, and fought with him, and took the ſhip wherein the lady was; the ſhips were diſperſed by ſtorm; the king of Denmark and the lady caſt upon Northumberland, and taken by Belinus. His brother Brennus, re-collecting his ſhips and forces, landed in Britain, and fought with Belinus, but loſt the day with the death of 20,000 men and almoſt all his Norwegians ſlain, himſelf hardly eſcaping into France. Belinus having obtained the victory, *convocavit omnes regni proceres intra Eboracum conſilio eorum tractaturus quid de rege Dacorum faceret*, he ſummoned all the peers of the kingdom to York to adviſe with them what he ſhould do with the king of Denmark.

Galfr. Monum.

OF the ſummoning of councils, and of the word *proceres*, ſomewhat hath been ſaid before; that which I ſhould ſpeak of here is the place of meeting of the public council, which is named to be at York, the next city in honour and antiquity to London: but in regard that there

* The enſuing Tract is a part of ſome collections on conſtitutional ſubjects, by BULSTRODE WHITLOCKE, commiſſioner of the great ſeal in the time of the Commonwealth, which may perhaps throw ſome light on the queſtion of the right of parliament to adviſe in concerns of peace and war, which has lately been very ably contended for in both houſes of parliament. Other tracts of the ſame author, apparently in his own hand-writing, are in the hands of the EDITOR, and are intended to be brought forward in this publication.

there is much more matter upon this subject than this book will conveniently admit to be here inserted, I must refer my more large discourse hereupon to another book, where further occasion for it will be offered.

The business about which the public council was summoned by Belinus, was to advise what should be done with the king of Denmark, then in prison, who had proposed to the king to submit himself and his kingdom to Belinus, and pay him a yearly tribute, if he would permit him, with the lady, to return free to Denmark, and that the league should be confirmed by oath and pledges; *convocatis proceribus cum id indicatum fuisset assensum præbuerunt cuncti*, &c. The peers being called together, when this was related to them they all assented thereunto. Belinus, according to their advice, released the king of Denmark out of prison; and he and the lady upon these conditions returned to Denmark. Of matters of peace in public councils. Galfr. Monum.

The matters of peace and leagues with foreign princes are proper for the consultations and determinations of public councils, and have been generally proposed to them.

Brute advised with the *majores natu*, his public council, about matter of peace with Pandrasus, as is before in the story.

Arviragus, by the counsel of the *majores natu*, made peace with Claudius the emperor, and agreed to pay him tribute, &c.

The *magnates Britanniæ* advised king Octavius to bestow his daughter and crown upon Maximinian, a Roman senator, for confirmation of peace between the Britons and Romans. The like was in king Arthur's time.

King Ethelred, by the counsel of his primates, made a peace with the Danes, and gave them a yearly tribute, *pro bono pacis*, for the good of peace.

The like agreement for peace was made with the Danes, *rex et senatus Anglorum*, the king and the senate of

of England, consenting to it in the same king's reign; and a third peace upon the like terms by the same king and his public council.

In the year 1188, our king *R.* 1. made a peace with the king of France, *præsentibus episcopis et magnatibus utriusq. regni. Hovden.* p. 765. *Math. Paris*, p. 156. 50. the bishops and great men of both kingdoms being present, and doubtless with their advice.

In the year 1201, in the peace between king John and France, it was agreed, that if either king did break the peace, his barons should be absolved of their fealty, and take part with the other king against their own.

In the year 1217, a peace was made between *H.* 3. and Lewis of France by advice of their counsellors, &c.

The peace between England and Scotland, 2. *E.* 3. was concluded by the parliament at Northampton.

The matter of peace between England and France was proposed to the parliament, 5. *E.* 3. Rot. Parl. n. 2. So were they in the parliament in 17. *E.* 3. Rot. Parl. n. 7. &c. Where a cause of the parliament is declared to be concerning the truce in Britain, n. 9. it is said, that as the king attempted not war without the parliament's assent, so without the same he would conclude no peace. Whereupon the lords and commons severally give their advice, that it was good to pursue the peace. The like consultation in 18. *E.* 3. Rot. Parl. n. 6. 22. *E.* 3. *ib.* n. 2. 28. *E.* 3. *ib.* n. 2.

The commons, in the matter of the peace with France, do agree to the order of the king and his nobles. 28. *E.* 3. Rot. Parl. n. 58. 29. *E.* 3. *ib.* n. 5. 9.

Peace with the Scots denied by the lords and commons, 42. *E.* 3. Rot. Parl. n. 7.

Peace with France treated on, 43. *E.* 3. Rot. Parl. n. 1. 2. 7. *R.* 2. *ib.* n. 4. 16. 17. 18. 13. *R.* 2. *ib.* n. 1. 14. *R.* 2. n. 1. 16. *R.* 2. *ib.* n. 1. 17. *R.* 2. *ib.* n. 1. 6. *H.* 4. *ib.* n. 2. 8. *H.* 4. *ib.* n. 10. 3. *H.* 5. n. 14.

4. *H.* 5.

4. *H.* 5. n. 3. 14. *H.* 6. n. 1. 23. *H.* 6. n. 23. 24. and many others of the like nature in our records and histories.

In France the first parliaments used to treat of peace; and both there and in other nations in their public councils, matters of peace were generally debated and advised upon, as being of so great weight and consequence to all men, that it was held proper for the consideration of such councils. Haillan, f. 189.

BELINUS, by the advice of his public council, did make a league with the king of Denmark, to which the council did assent, as to a matter very proper for their advice and concurrence. Of leagues treated on in public councils.

THE same instances which are remembered in the present chapter of public councils consulting about matters of peace, are also applicable to their consultations about leagues, and therefore not necessary to be repeated.

THE league made by the barons against king John was *communi consensu*, *Math. Paris*, p. 235. 7. by common consent of them all.

THE commons, having given aid to the king, do require, that if any league be taken with the enemy, that the profit may be laid up for the ease of the commons, 5. *R.* 2. Rot. Parl. n. 68. 6. *R.* 2. *ib.* n. 9.

A LEAGUE between the king and Sigismund king of the Romans, and their heirs and successors, is confirmed by whole assent of parliament, 4. *H.* 5. Rot. Parl. n. 14. The instrument of this alliance is upon record in the parliament rolls of this time.

A GRANT by the parliament to the queen dowager in pursuance of a league, 1. *H.* 6. Rot. Parl. n. 40.

THE league between the duke of Burgundy and the French considered in parliament, 14. *H.* 6. Rot. Parl. n. 2.

LIKEWISE a league to be had between England and France treated on, 23. *H.* 6. Rot. Parl. n. 2. 8. *E.* 4. Rot. Parl. 11. 27.

AMONG the Jews it is alledged that their great ſenate *cognoſcebat de fœderibus, Shiccardus c. Elect. Theor. 2. Maſſicht. Sank. Maſchenos & Talmud*; had cognizance of leagues; and that made with the Gibeonites was by aſſent of the princes. Joſhua, c. 9. v. 15. "And Joſhua made "peace with them, and made a league with them to let "them live, and the princes of the congregation ſware "to them."

Of matters of war in public councils.

BELINUS, governing the whole iſland from ſea to ſea in quiet, confirmed the laws which his father made; he cauſed the great highways croſs the iſland to be made.

BRENNUS his brother, not obtaining ſuccour in France, went to the duke of the Allobroges, that is, of Savoy and Piedmont, where he was honourably received, married to his only daughter, and after his death ſucceeded him in that kingdom, where he raiſed an army and tranſported it into Britain. His brother Belinus being ready with another to fight with him, the mother of them both came to Brennus in the midſt of his troops, and fell upon his neck, kiſſing him, and, ſhewing him her breaſt which gave him ſuck, with pathetical arguments of a mother perſuaded him to go unto his brother and forbear the battle. Belinus met his brother with all affection, and by this mediation of the mother the brothers were reconciled, and came together to Troynovant, London; where, *conſilio cæpto quid facerent*, having taken council what they ſhould do, they prepared an army together to invade France.

THAT the matter of war is proper for the advice of public councils, the ſame authorities which are before cited for matters of peace and league are pertinent likewiſe to this ſubject, and need no recital.

IT hath been the conſtant practice, as throughout all our ſtories doth appear, to adviſe with public councils in matters of war.

THIS was done by Brute, Belinus, Caſſivelaune, Arviragus,

Viragus, Vortigern, Aurelius, Ambrosius, Arthur, and generally all the British, Saxon, Danish, Norman, and other kings of this nation, and of all other countries; it being a thing so proper and natural in matters of that great moment as war is to advise with council about, and so safe and prudent for a prince not to adventure upon without the counsel of others.

THE several stories do manifest this, and are too many to be particularly mentioned.

MATTERS of war with France were treated on in parliament 6. *E.* 3. Rot. Parl. n. 1. 17. *E.* 3. n. 9. 18. *E.* 3. n. 8. 25. *E.* 3. n. 7. 42. *E.* 3. n. 7. 45. *E.* 3. n. 1. 47. *E.* 3. n. 2. 50. *E.* 3. n. 2. 51. *E.* 3. n. 12. 2. *R.* 2. n. 6. 19. 25. 3. *R.* 2. n. 5. 4. *R.* 2. n. 3. 6. *R.* 2. n. 3. 7. *R.* 2. n. 3. 8. *R.* 2. n. 2. 9. *R.* 2. n. 4. 10. *R.* 2. n. 2. 11. *R.* 2. n. 1. 14. *R.* 2. n. 1. 15. *R.* 2. n. 2. 17. *R.* 2. n. 1. 2. *H.* 4. n. 12. 4. *H.* 4. n. 3. 6. *H.* 4. n. 3. 11. *H.* 4. n. 2. 2. *H.* 5. n. 5. 3. *H.* 5. n. 3. 4. *H.* 5. n. 3. 7. *H.* 5. n. 1. 14. *H.* 6. n. 2. 27. *H.* 6. n. 17. 29. *H.* 6. n. 1. 8. *E.* 4. n. 28. 14. *E.* 4. n. 18.

CONSULTATIONS in parliament touching the war with Scotland, and other parts, are in the rolls before cited, and in 6. *E.* 3. Rot. Parl. n. 6. 50. *E.* 3. n. 2. 1. *H.* 4. n. 81. 8. *H.* 4. n. 2. 17. *R.* 2. n. 1. 1. *H.* 5. n. 9.

I HAVE taken the pains to insert the particular parliaments wherein matters of war were treated on, that it may be seen how, in all times of war, the advice of the parliament was therein required, and that by our wisest and best kings; and the same course was continued even to our times.

SOME do take the true state of this question to be, that the king, if he please, may commence a war against any foreign enemy, but that he cannot maintain it without the consent of parliament, unless he have sufficient of his own means to defray the charge of it, because he can levy no money without assent of the parliament; nor can the king

compel any man to serve him in his wars without the like consent.

As it is to this day among the Swedes and Goths, where the king can raise no money without the Ricksdagh, nor compel any to serve him in his wars abroad but by their act.

AND this is also the law in Germany, and other countries, and taken to be grounded upon the law of the Jews: their great senate *cognoscebat de bello*, *Shiccardus Jus Reg. Hæbræor. c. Elect. Theor.* 2.; had cognizance of wars, which could not be undertaken, *nec omnes obligabant*, *invito Synedrio*, *Schiccardus c. Bellum. Mayin Melach. c.* 2. nor did bind all without the consent of the Sanhedrim. It is further said of the king of the Jews, that he being to begin a war with any of his neighbours, *necessario prius deliberabat cum magno senatu*, *citra cujus consensum miles non exibat.* &c. was of necessity first to consult with the great senate, without whose consent the soldier was not to go forth.

WITH this agrees the law of England in terms, and that of Sweden; and it was the law of Germany and of most other countries: and certainly where chief magistrates do advise with their great senates in matters of war, they commonly prosper; but where they do engage in wars upon their own judgment, or by advice of some few persons, and perhaps flatterers, it seldom thrives, but mischief and prejudice accompanies such undertakings; as it did that of Brennus, who, by such advice, brought soldiers from Norway and invaded his brother, to his own no small detriment and hazard: but when both brothers joining together advised with a public council about matter of war, and by their council undertook it, the success thereof proved very great; for they, by this advice, transporting their army into France, subdued all that country and the several kings of it, and of other countries; went to Rome, wasting Italy.

who

who made a peace with them by great gifts of ſilver and gold, and a yearly tribute.

FROM thence they went to Germany, whom the Romans aſſiſted, contrary to their league with the Britiſh brothers; to revenge which, Brennus marched to Rome with part of the army, Belinus with the other part of the army vanquiſhed their enemies in Germany, and overtook his brother at the ſiege of Rome, where they hung twenty-four noble Romans who were hoſtages for the peace; and after a ſharp fight with the conſuls on the one ſide of them, and the citizens iſſuing out on the other ſide of them, the brothers with a great ſlaughter obtained the victory, Gabius, one of the conſuls, being ſlain, and Porſenna, the other, taken priſoner: they alſo took the city of Rome itſelf, and beſtowed the hidden wealth of it among their ſoldiers. Brennus ſtaid and died in Italy; Belinus returned to Britain, where he governed in peace, built Glouceſter, Billingſgate, and the great Tower in London, where he was buried.

No. XI.

LORD LOUGHBOROUGH's ARGUMENT *on* FINES ON ADMISSION TO COPYHOLD ESTATES, *in the* CASE *of* GRANT *versus* ASTLE, *in the* COMMON PLEAS.

THE Cafe in which this argument was delivered came on at the affizes for the county of Effex, when a general verdict was found for Aftle, fubject to the opinion of the court of common pleas on a cafe referved; which ftated, That Aftle was lord of the faid manor of which the tenements mentioned in the declaration were parcel, and that the fame were held of Aftle, as lord of the faid manor, by copy of court-roll, at the will of the lord, according to the cuftom of the faid manor, and *that the fine was arbitrary*; that Grant had craved admiffion on the death of his father, and was accordingly admitted in fee to all the faid copyhold tenements, upon which admiffion a fine of 98 *l.* 18 *s.* 4 *d.* was affeffed; that the faid fine of 98 *l.* 18 *s.* 4 *d.* appeared to be two years improved value of the faid tenements to which Grant was admitted, after deducting 2 *l.* 19 *s.* 8 *d.* for the *quit-rents*, which were 1 *l.* 9 *s.* 10 *d.* a year; that Aftle had not deducted any-thing out of the faid fine for *land-tax*; that Grant had paid 84 *l.* 5 *s.* 8 *d.* into court upon the common rule.

THE queftion ftated upon this Cafe was, Whether the lord of the faid manor was bound to allow any fum of money for land-tax out of the faid fine? If he was, a nonfuit was to be entered; if not, the verdict to ftand.

AFTER the Cafe had been argued at the bar, lord Loughborough delivered the Opinion of the court to the following effect:

LORD

LORD LOUGHBOROUGH. 'This question was truly 'considered as of great concern to the public at large: it 'has undergone a very deliberate examination, and we are 'all of opinion, that the lord of the manor is not bound to 'make any deduction for the *land-tax* out of a fine due for 'admission on a descent, which is the present case.

'THE grounds which led us to this determination lie 'in a very narrow compass.

'IN the *first* place the land-tax is annual, and, however 'probable its continuance may be, there can be no legal 'presumption as to the future intentions of the Legislature, 'and there can be no deduction, by anticipation, of an un-'certain future burthen.

'IN the *second* place the tax, though commonly called 'a tax upon land, is not in its nature a charge upon the 'land; it is a tax upon the faculties of men, estimated, 'first, according to their personal estate; secondly, by the 'offices they hold; and lastly, by the land in their occu-'pation. The land is but the measure by which the fa-'culties of the person taxed are estimated; and where it is 'intended by the Legislature that the burthen should not 'ultimately rest upon the person charged, a power of de-'ducting is given him by the act; as in the case of rents, 'and other certain outgoings: but no deduction is allow-'ed for fines, which are uncertain.

'IN the *last* place, this claim being new, and there being 'no precedent nor instance to support it, the usage of al-'most a century is a strong proof that no such deduction 'ought to be made, and amounts to a contemporary and 'permanent exposition of the land-tax acts in favour of the 'lord.

'THESE are the reasons which have weighed in the 'opinion of the court to determine this Case in the man-'ner I have stated.

'BUT the subject having led to much curious and in-'teresting inquiry into the nature of copyhold estates,

'and the progreſſive advancement of the rights of the te-'nant, I wiſh to ſtate a few circumſtances that have oc-'curred to my obſervation, for the inaccuracies of which 'I only am anſwerable. I do it in order to excite the 'inveſtigation of perſons more able and more diligent; 'particularly of thoſe who are acquainted with the anti-'quities of this country as well as its laws: and I wiſh it 'may have the effect of engaging the attention of the 'plaintiff in the preſent cauſe, who I am ſure is very able 'to make an inquiry of the nature I am going to point 'out.

'COPYHOLD tenures are agreed by all writers to be 'more antient than the Norman government. In ſome of 'the moſt approved authors the copyhold tenure of land is 'derived from the ſtate of *villenage*, which now happily 'forms a very obſcure title in the law. It is ſuppoſed, that 'all copyholders were originally villeins, and that by the 'mitigation of villenage, and the progreſs of enfranchiſe-'ment, the eſtate grew by degrees to be more free and 'permanent, till it came into the condition of a copyhold.

'I CANNOT help doubting whether that deduction is 'not founded in miſtake. The circumſtance which firſt 'led me to entertain the doubt is, that in thoſe parts of 'Germany from whence the Saxons migrated into England, 'there exiſts *at this day* a ſpecies of tenure exactly the 'ſame with our copyhold eſtates, and that there exiſts 'likewiſe *at this day* a complete ſtate of *villenage*; ſo that 'both ſtand together, and are not one tenure growing 'out of another, and by degrees aſſuming its place. In 'Eaſt Frieſeland, the dutchy of Brunſwick, and other 'northern parts of Germany, there are villeins in groſs, 'and villeins regardant, with the ſame rigour which our 'law formerly knew. There are alſo copyhold tenants 'who are freemen, but whoſe eſtates are alienable only by 'licenſe, and are tranſmiſſible by deſcent; and in both

'inſtances

'instances they must pass through the courts of the lord. 'Nay, in the antient seat of the Anglo-Saxons there exists at this day that peculiar descent to the youngest son 'which we call *borough English*; of which the name shews 'the original.

'WHAT I have stated I found in a very accurate treatise of German law by Selchow, one of the professors of 'the university of Gottingen, entitled, "*Elementa Juris Privati Germanici*."

'THIS seems sufficient to negative the idea that copyholders sprang out of villeins. In England villenage has 'ceased and copyholds remain; but here, as in other 'countries, they both prevailed at the same time.

'IT is not difficult to conceive that, whenever agriculture became an object of respect in the northern and 'western parts of Europe, those who applied themselves 'to the cultivation of land, though inferior in point of 'dignity, would be equal in point of freedom to those 'whose only profession was arms. The copyhold tenants 'were husbandmen; their persons were free; and in that 'respect they were as much above the villeins as, in point 'of consequence, they were inferior in a military age to 'those who had arms in their hands. Their lands were 'held of a lord who could defend them, and who, in return for that defence, was entitled to certain profits and 'advantages founded upon paction express or presumed.

'A FINE to be paid on the change of a tenant is almost 'a constant incident of a copyhold estate, and it does not 'seem to have been long before the end of the reign of 'queen Elizabeth that courts of law interposed to moderate the exercise of the lord's right to a fine, where the 'custom had left the amount of it uncertain; for it is 'pretty remarkable that a question on this subject was depending in the 36th and 37th of queen Elizabeth, in the 'court of king's bench, and in this court, at the same 'time: you will find it in 1. Rolle's Abr. 507. and in the

'con-

'contemporary reporters. The queſtion was this: Under
'what circumſtances a refuſal to pay a fine ſhould amount
'in a court of law to a forfeiture of the copyhold eſtate?

'It was contended upon the part of the lord, that the
'mere non-payment of the fine aſſeſſed would amount to
'a forfeiture.

'That propoſition appeared too ſtrong even in a court
'of law; however, the court of king's bench, in the
'36th of Elizabeth, held, that after the deman[illegible]le
'by the lord, and the refuſal of the tenant to pa[illegible]point
'the fine ſhould be unreaſonable, the eſtate ſhould[illegible]
'feited.

'This court, a term or two afterwards, in the Caſe
'of Jackman *v.* Hoddeſdon, reported in Cro. Eliz. 351.
'held, that in ſuch caſe there was no forfeiture. The
'court of king's bench (as has been juſt ſtated) had held
'the contrary, but the opinion of this court prevailed;
'and in the 43d of Elizabeth, in the Caſe of Hobart *v.*
'Hammond, reported in 4. Co. 27. b. the court of king's
'bench, referring to the Caſe of Jackman *v.* Hoddeſdon
'in the common pleas, varied their idea, and held, that
'the refuſal to pay an unreaſonable fine was no forfeiture
'of the eſtate. From the manner in which the report of
'that Caſe is ſtated, and the anxiety with which the Judges
'ſupport the propoſition, one would be apt to conclude it
'had not been of great antiquity.

'A few years afterwards, in the 6th of king James,
'in Willowe's Caſe, 13. Co. 1. this point again occurred,
'and the law was not then taken to be ſo ſettled as for the
'court ſimply to ſay, "the point is ſo;" but the report
'ſtates a great deal of reaſoning and argument to ſupport
'the poſition, that the Judges not only might, but ought,
'either upon the facts appearing upon a demurrer, or upon
'evidence, to go to a jury, to determine what was a rea-
'ſonable fine; and in that caſe the court held, that two
'years value was an unreaſonable fine.

Thus

'THUS then the matter rested; the fine was to be 'assessed by the lord, and whether it was reasonable or 'unreasonable, was a question for the consideration of 'the court and jury; and it would obviously be subject to 'much fluctuation and uncertainty. To prove upon a 'trial the annual improved value of land, and then to cal- 'culate how much of that value should be paid for a fine, 'was likely to be attended with so much dissatisfaction, 'that recourse would frequently be had to the court of 'chancery, which had always relieved against the forfei- 'ture, and taken upon itself, without a jury, to determine 'what should be a reasonable fine.

'LORD-KEEPER COVENTRY, in the 5th of Charles I. 'and again, in the 12th of the same reign (1. Chan. Rep. 18. 'or 33. (a), and *ibid.* 51. or 96. (b), held, that *one* year's 'improved value was a reasonable fine—guarding the de- 'cree—that one year's value should not be counted a fine 'certain, but referrable to the discretion of the court whe- 'ther it was reasonable, and that the payment was then 'directed because it was reasonable.

'IN the 29th of Charles II. in the year 1677, lord 'Nottingham, in the Case in 2. Rep. in Chan. 135. (c), 'held, that *two* years value was a reasonable fine; and 'at the time of this determination, in 1677, two years 'value was not a much higher payment than one year's 'value had been at the time of lord Coventry's determi- 'nation. The interest of money had been reduced, and 'from that and other causes the value of land had risen. 'One year's value might be nearly as large as an *aliquot* 'part of the selling price of land in the 5th of Charles I. 'as two years value at the time of lord Nottingham's de- 'termination. From that time to the present the idea of two 'years value being a reasonable fine, in the case of a fine ar- 'bitrary (or, in the more proper phrase, *arbitrable* (d)),

(a) Middleton v. Jackson.
(b) Popham v. Lancaster.
(c) Morgan v. Scudamore.
(d) Cro. Eliz. 351.

'has

'has prevailed uniformly; and the adhering to this rule has 'been a matter of very great convenience, though it can'not be said to be a matter of strict justice.

'Two years value, the interest of money being six '*per cent.* as at the time of lord Nottingham's determina'tion, is a much larger proportion of the selling price of 'a copyhold estate than the same number of years purchase 'the interest of money being at five and four *per cent.* 'But to follow the variations of price would create [illegible]se 'fusion in this property, would occasion a depreci[illegible]point 'it, and is not the true interest of the copyholder. [illegible] 'lic convenience therefore, that great source of law and 'justice, has established the authority of the rule laid down 'by lord Nottingham; and it is to be observed, that the 'decision was not above eighteen years prior to the first 'land-tax act. From that time to the present hour not an 'instance can be found where there has ever been a deduc'tion from the two years value (then fixed as the utmost 'amount of a fine) upon account of the land-tax.

'It seems therefore to me much better for the inte'rest of copyhold tenants, and for the public advantage, 'as there is a great deal of that property in the kingdom, 'that the fine to be paid upon the renewal of a copyhold 'estate should be strictly kept to that sum which has sub'sisted now above a century, namely, two years improved 'value, without any deduction except for quit-rents, which 'can hardly be called a deduction, for the lord must allow 'that which he has received or is to receive *.'

* On this judgment of the court of common pleas a writ of error was brought in the king's bench, whereon a *venire de novo* was granted, and the cause was accordingly again tried before Justice Ashhurst at the Lent assizes for the county of Essex, 22. Geo. 3. when a verdict was found for the plaintiff Astle, subject to the determination of the court of king's bench, "Whether the plaintiff was bound to prove the exact sum laid?" On which lord Mansfield delivered the Opinion of the court in favour of the defendant, for whom judgment was accordingly given. The Case is reported in Douglas 722; from whence the foregoing Argument of lord Loughborough in C. P. is extracted.

No. XII.

CASE *on the* CONSTRUCTION *of* MARRIAGE ARTICLES *and* CROSS REMAINDERS; *with* OPINION *of* MR. BOOTH, ARGUMENT *of* MR. WEDDERBURNE, *and* DECREE *of* LORD CHANCELLOR APSLEY.

BY articles of agreement made between Charles duke of Richmond (father of Charles then earl of March, afterwards duke of Richmond), of the one part, and William late earl Cadogan, father of lady Sarah Cadogan, of the other part, in view and consideration of a marriage then intended between the said earl of March and lady Sarah Cadogan, the said earl Cadogan did covenant that he would acknowledge unto the duke a recognizance or statute staple in the penalty of 100,000l.; which recognizance is thereby declared should be a security, that the said earl, his heirs, &c. should, within three years next

Lord Cadogan, by articles made on the marriage of his daughter with the earl of March, covenants to lay out 60,000l. in the purchase of lands, to be settled to lord Cadogan for life, remainder to lord March for the joint lives of himself and his wife; remainder, if the lady survived, and there was no issue of the marriage, to lord Cadogan in fee; but if she survived, and there was issue, then, as to a moiety, to the lady for life, and as to the other moiety during her life, and the whole after her death to the children of the marriage, as lord and lady March should appoint; and for want of appointment, to all the children (the eldest son always excepted) as tenants in common in tail; and for want of such issue, to the eldest son in tail; and for want of such issue, to lord Cadogan in fee. The money is afterwards laid out in the purchase of lands, which are conveyed to the then subsisting uses of the articles. Lord and lady March die without making any appointment, leaving an eldest son and six younger children. The eldest son afterwards purchases the trust estates; has them conveyed to him by an act of parliament on his engaging to pay certain pecuniary portions to the younger children; the portions of the younger sons to be paid at twenty-one, and those of the daughters at twenty-one, or marriage: and in case of their deaths before such respective periods, the same to be paid to the persons who would be intitled thereto under the articles. One of the daughters afterwards dies under twenty-one unmarried.—The several OPINIONS of MR. BOOTH and MR. PATTERSON, Whether the eldest son was intitled to the portion of the deceased daughter, or, a court of equity would supply the want of cross remainders in the articles, and direct the portion of the deceased to be divided amongst the surviving younger children?

N. B. To this Case, and the Opinions thereon, is subjoined a Note of the same Case, as afterwards argued before lord chancellor APSLEY, who decreed in favour of the younger children.

after

after the said marriage should be had, lay out the sum of 60,000l. in the purchase of lands, tenements, or hereditaments, in England, of an estate in fee simple; which, when purchased, should be settled and assured; and the interest and produce of the monies, until such purchase should be made, should immediately from and after the end of the said three years be applied to the use of the said earl Cadogan during his life, and after his death to the use of the said earl of March during the joint liv[illegible] the said earl of March and lady Sarah Cadogan; on of she should survive the said earl of March, her th[illegible] tended husband, without a child or children of the marriage, to the use of the said earl Cadogan, his heirs and assigns for ever; and if she should survive the said earl of March, and there should be issue of the marriage then living, or born afterwards, then, as to one moiety thereof, to the use of the said lady Sarah Cadogan for life; and as for the other moiety thereof during her life, and the whole after her death, to the use of all and every the child and children of the bodies of the said earl of March and lady Sarah Cadogan, *viz.* if but one such child, to such only child and the heirs of the body of such child; and if there should be two or more such children, then to all and every such children (the eldest son, if there shall be such, only excepted), and for such estate or estates and in such manner and proportions as the said earl of March and lady Sarah Cadogan, his intended wife, should by any deed or writing declare, direct, limit, and appoint the same or any part thereof, so as to every child of the said marriage (the eldest son only excepted) an estate of the value of 10,000l. at the least should be sufficient in value for that purpose; and in default of such appointment, to the use of all and every such children of the said earl of March to be begotten on the body of the said lady Sarah Cadogan (the eldest son, in case there should be any, always excepted), equally to be divided between them, share and

share

ſhare alike, as tenants in common, and not as joint tenants, and to the ſeveral and reſpective heirs of their reſpective bodies iſſuing; and for want of ſuch iſſue, to the uſe and behoof of ſuch eldeſt ſon, if there ſhould be any, and the heirs of his body lawfully to be begotten; and for want of ſuch iſſue, to the uſe and behoof of the ſaid earl Cadogan, his heirs and aſſigns for ever.

THE marriage was afterwards had; and the ſaid earl Cadogan acknowledged, before the lord chief juſtice of the court of common pleas, at Weſtminſter, a recognizance, in the nature of a ſtatute ſtaple, in the penalty of 100,000 l. but died before he laid out the ſaid 60,000 l., or any part thereof.

THE ſaid earl Cadogan by his will ratified the ſaid marriage articles, and gave whatever eſtate he had, or was intitled unto, after the deceaſe of the ſaid duke and ducheſs of Richmond without iſſue of their bodies, by virtue of the ſaid articles, to his youngeſt daughter lady Margaret Cadogan, and her iſſue, with ſeveral bequeſts over, as therein is mentioned; and did among other things) give and deviſe unto Henry earl of Shelburne, John lord Carteret (afterwards earl Granville), and the ſaid teſtator's brother colonel Cadogan, afterwards Charles lord Cadogan, their heirs, executors, and adminiſtrators, all his the ſaid teſtator's real eſtates in England, and all his perſonal eſtate not therein before diſpoſed of, in truſt to ſell and diſpoſe of the ſame, and by and out of the monies thereby ariſing pay and ſatisfy, in the firſt place, all ſuch ſums of money as he had covenanted to pay by virtue of the ſaid articles, and appointed his ſaid truſtees to be likewiſe truſtees for ſecuring and laying out the ſame accordingly, and made alſo executors of his ſaid will. 27th June 1726. Will of the ſaid earl Cadogan.

BY a decree in chancery made in a cauſe between the ſaid Charles late earl of March, then duke of Richmond, and the ſaid Sarah Cadogan his wife, then ducheſs of Richmond, and others, plaintiffs, and the ſaid Charles lord 11th July 1728. Decree in chancery. Duke and ducheſs of Richmond, and others, againſt lord Cadogan's executors, and others.

lord Cadogan, Henry earl of Shelburne, and John lord Carteret, afterwards earl Granville, the executors and truſtees of the late earl Cadogan, and others, defendants, it was amongſt other things ordered and decreed, that the executors and truſtees named in the ſaid earl Cadogan's will ſhould ſell all his real and perſonal eſtates (not ſpecifically deviſed), with the approbation of the maſter; and out of the money ariſing by ſuch ſale, the ſaid 60,000 l. was to be, in the firſt place, paid and [illegible] out in the purchaſe of lands, with the ſaid maſter's [illegible]n of bation, and ſettled to ſuch of the uſes in the ſaid m[illegible] articles as were ſtill ſubſiſting (except the remainder to the earl Cadogan and his heirs), and that remainder was to be veſted in the truſtees till the further direction of the court.

Iſſue of the marriage.

THE ſaid Charles duke of Richmond, late earl of March, had iſſue by the ſaid Sarah ducheſs of Richmond, his wife, late lady Sarah Cadogan, Charles now duke of Richmond, his eldeſt ſon, and ſix younger children, *viz.* lord George Lenox, lady Georgina Caroline, who intermarried with the right honourable Henry Fox, Eſq. (now lord Holland), lady Amelia, who intermarried with James earl of Kildare (now duke of Leinſter), lady Auguſta Louiſa, lady Sarah, and lady Cecilia Margaretta, and no other iſſue: to, or amongſt, whom no appointment was made by their father or mother of the ſaid 60,000 l. or the lands to be purchaſed therewith, purſuant to their power in the ſaid marriage articles.

29th Feb. 1749. Will of Charles late duke of Richmond.

THE ſaid Charles duke of Richmond (late earl of March), by his laſt will, made the ſaid Sarah ducheſs of Richmond, his wife, who ſurvived him, guardian of four of his ſaid younger children, *viz.* lord George Lenox, and the ladies Auguſta, Sarah, and Cecilia Margaretta, who were then minors, during his wife's life; and after her death, appointed Thomas Holles duke of Newcaſtle, William earl of Albemarle (both ſince deceaſed), the ſaid

James earl of Kildare (now duke of Leinſter), Charles lord Cadogan, Henry Fox (now lord Holland), and Thomas Hill, eſq. ſince deceaſed, their guardians during their reſpective minorities.

THE ſaid Sarah ducheſs of Richmond afterwards departed this life.

THE ſaid maſter by his report certified, that the ſum of 57,409l. 19s. 8d. part of the ſaid 60,000l. had been laid out purſuant to the ſaid decree, with his approbation, in the purchaſe of the manors of Charleton and Singleton, and other eſtates mentioned in the ſchedule to his ſaid report annexed, and that there remained the ſum of 2590l. 0s. 4d. reſidue of the ſaid truſt-monies, to be laid out in the purchaſe of lands purſuant to the ſaid decree; and that the only remaining fund to anſwer the ſame conſiſted of 1557l. 18s. 7d. Bank Annuities, then ſtanding in the name of the ſaid truſtees. 26th Feb. 1756. Maſter's Report.

BY an act of parliament for veſting the foreſts and manors of Singleton and Charleton, and other lands and tenements in truſtees freed and diſcharged from the eſtates and truſts to which the ſame then were ſubject, and for other purpoſes therein mentioned, reciting to the effect herein-before ſtated: and further reciting, that the ſaid younger ſon and daughters of the ſaid late duke and ducheſs of Richmond were, by virtue of the ſaid marriage articles, ſeverally ſeiſed of and entitled to the lands then purchaſed, and remaining to be purchaſed, with the ſaid 60,000l. as tenants in common, to them and the heirs of their reſpective bodies, with croſs-remainders of ſuch of their reſpective ſhares, in caſe of any of their deaths without iſſue, to the ſurvivors of them in common in tail, with other remainders over; ſo that the ſaid Henry Fox (now lord Holland) and lady Georgiana Caroline his wife, and the ſaid earl of Kildare (now duke of Leinſter) and Amelia his wife, were then enabled, and the ſaid lord George Lenox, and the ſaid ladies Auguſta, Louiſa, Sa- K.G.II.1757-8. Act of Parliament.

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rah, and lady Cecilia Margaretta, when they ſhould attain their ſeveral ages of twenty-one years, would be enabled, to ſuffer recoveries of their reſpective undivided ſixth parts of the ſaid premiſes, and thereby bar the intails and remainders created by the ſaid marriage articles, and alſo the reverſion and remainder in fee of the premiſes deviſed by the will of the ſaid earl Cadogan; but that it would be very prejudicial to all the parties intereſted therein that the ſaid eſtates ſhould be ſevered and divided into ſix parts among the ſaid children of the ſaid late duke and dutcheſs of Richmond:

Propoſal. RECITING further, that the ſaid Charles now duke of Richmond, in order to prevent the great prejudice and inconvenience which would happen by a diviſion of the ſaid eſtates, had propoſed to take the ſaid purchaſed eſtates and the ſaid 1557l. 18s. 7d. Bank Annuities ſo remaining, and, in conſideration thereof, pay and give ſecurity for the ſaid ſum of 60,000l. in manner following, *viz.* to pay to the ſaid Henry Fox (now lord Holland) 10,000l. to the ſaid earl of Kildare (now duke of Leinſter) 10,000l. and give ſecurity to pay the ſaid George lord Lenox 10,000l. at his age of twenty-one, and for payment of 10,000l. a-piece to the ſaid ladies Louiſa, Sarah, and Cecilia Margaretta, on their attaining their reſpective ages of twenty-one years, or days of marriage reſpectively; and in caſe of the death of the ſaid lord George Lenox under the age of twenty-one years without iſſue, or of the ſaid three younger ſiſters before their reſpective ages of twenty-one and unmarried, for the payment of their reſpective 10,000l. to ſuch perſon or perſons as ſhould be intitled by virtue of the ſaid marriage articles, earl Cadogan's will, and decree, to their reſpective ſhares of the ſaid purchaſed eſtates and Bank Annuities:

RECITING alſo, that the ſaid Henry Fox (now lord Holland) and his wife, and the ſaid earl of Kildare (now duke of Leinſter) and his wife, were willing and deſirous

to accept the faid propofal, but the faid four other younger children, being then minors, could not confent thereto; and therefore it had by an order of court been referred to the faid mafter to fee whether it would be for their benefit that the faid propofal fhould be carried into execution. And the faid mafter, by his report dated 7th Feb. 1758, certified, that he conceived the fame to be for their benefit; which report was confirmed; but by reafon of the minority of the faid four youngeft children, the faid propofal could not be carried into execution without an act of parliament, in order to difcharge the faid eftates already purchafed, and the faid 1557l. 18s. 7d. remaining to be laid out in lands from the eftates, ufes, and trufts to which the fame were then fubject.

It was enacted (among other things), that the faid manors, meffuages, lands, and the hereditaments in the act mentioned, which had been purchafed with the faid 57,409l. 19s. 8d. part of the faid 60,000l. as aforefaid, fhould and were thereby vefted in and fettled upon George earl of Albemarle, Charles lord Cadogan, and George Bridges Brudenell, truftees therein named, and their heirs, to the ufe of them, their heirs and affigns, abfolutely freed and difcharged of and from all the eftates, ufes, trufts, bequefts, powers, limitations, provifos, charges and agreements whatfoever created, devifed, expreffed and declared of and concerning the fame by the faid marriage articles, the will of the faid William earl Cadogan, and the faid decree, or any of them, in truft to convey and affure the fame to the faid Charles (now duke of Richmond), his heirs or affigns, or as he or they fhould appoint, upon his the faid duke's payment of 10,000l. a-piece to the faid Henry Fox (now lord Holland), and to the faid earl of Kildare (now duke of Leinfter), and the further fum of 10,000l. to the faid truftees appointed by the act, and entering into and acknowledging before the faid lord chief juftice of the court of common pleas a recognizance in

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the nature of a ſtatute ſtaple to them the ſaid truſtees, in the penalty of 60,000l. and in the mean time to ſuch perſon and perſons, and for ſuch eſtate and eſtates, as would have been intitled to the ſame if this act had not been made.

AND it was further enacted, that on the ſaid duke of Richmond's paying the ſaid 10,000l. a-piece to the ſaid lord Holland and duke of Leinſter, and the further ſum of 10,000l. to the ſaid truſtees, and entering into ſuch ſtatute ſtaple as aforeſaid, the ſaid 1557l. 18s. 7d. Bank Annuities ſhould be transferred to the ſaid duke of Richmond for his own benefit, and that the ſame ſhould not be ſubject or liable to any of the uſes, truſts, deviſes, bequeſts, limitations, or agreements mentioned in the ſaid marriage articles, or the will of the ſaid William earl Cadogan, or the ſaid decree, or either of them, provided, and it was further enacted, that the ſaid ſtatute ſtaple from the ſaid duke of Richmond to the ſaid truſtees, and the ſaid 10,000l. to be paid to them, ſhould be a ſecurity only for the due performance of the ſaid propoſal and payment of the ſaid four ſeveral ſums of 10,000l. each upon the contingencies therein-before-mentioned, with intereſt at four pounds *per cent. per annum*; and that until one of the ſaid four ſums ſhould become payable, it ſhould be lawful for the ſaid truſtees, with the approbation of the ſaid duke, to place out the ſaid 10,000l. ſo to be paid to them on government or real ſecurities, at intereſt in their own names, in order to be applied towards the payment of the firſt of the ſaid four ſums of 10,000l. each, which ſhould become payable, and the intereſt thereof, at four *per cent.* in the mean time.

AND it was further enacted, that upon payment of the ſaid three ſeveral ſums of 10,000l. to the ſaid lord Holland, the duke of Leinſter, and the ſaid truſtees as aforeſaid, by the ſaid duke of Richmond, and on his entering into the ſaid recognizance to the ſaid truſtees, he the ſaid duke and

and his heirs, and all other persons to whom, by his appointment, any conveyance should be made of the said manors, hereditaments, and premises, or any part thereof, should at all times after such conveyances made, hold and enjoy the said manors, hereditaments, and premises freed and absolutely discharged of, from, and against all and every the uses, trusts, estates, powers, provisos, limitations, and agreements limited, created, expressed, and declared, as aforesaid, concerning the same; and that they the said trustees should and were thereby indemnified against all demands from all persons to whom or to whose use the said manors, hereditaments, and premises had been limited and settled in pursuance to the said marriage articles, the will of the said William earl Cadogan, and the decree as aforesaid.

In pursuance of which act the duke paid or secured to lord Holland, the duke of Leinster, and the said trustees, the said three sums of 10,000l. and entered into the said statute staple in the sum of 60,000l.; and the said real estates that had been purchased as aforesaid were thereupon conveyed to the duke and his heirs pursuant to the said act.

The said lady Cecilia Margaretta Lenox, the youngest daughter, died unmarried and intestate, not having attained her age of twenty-one years, and her said portion of 10,000l. remaining unpaid to her, but standing secured by the said recognizance from the duke to her good liking, his grace having paid her interest for the same. Upon the — day of — 1769.

The duke, who was the eldest son, and lord George Lenox, the second son, and the other three daughters, are all living.

Who is intitled to the said 10,000l. the portion of the said lady Cecilia? and, Whether will the same go to all, or which, of her said brothers and sisters? and, How and in what manner, shares, or proportions? Query.

Mr. Booth's Opinion.

THIS Caſe requires a great conſideration; and his grace the duke of Richmond having been ſo indulgent to me as not to require any preciſe Opinion from me, his grace ſatisfying himſelf with having the difficulties of the Caſe, as they appear to me, pointed out, I ſhall here lay down, under diſtinct heads, ſuch grounds and diſtinctions as ſeem to me to be the fitteſt for the throwing that kind of light upon this Caſe which may be neceſſary for the coming at ſome degree of inſight into the difficulties which attend it: it is not neceſſary that theſe diſtinctions ſhould be all taken as fixed principles; ſome of them may be conſidered as only private concluſions or aſſumptions of my own.

First, I think that a portion is generally underſtood to be that part or ſhare which is appointed or allotted by the parent for the proviſion or livelihood of a younger ſon or daughter out of the general maſs of the landed eſtate, which is generally meant to be preſerved as entire as poſſible for ſuch of the deſcendants as in an hereditary courſe of ſucceſſion ſhall become the head of the family by the laws eſtabliſhed in this country.

The right of ſucceſſion to lands here firſt devolves on the males, where the right of primogeniture takes place, and then on the females in equal ſhares and proportions.

Secondly, Where in a marriage ſettlement any ſum of money is placed or agreed to be placed in the hands of truſtees, ſo as to conſtitute a capital fund, which is to be laid out in the purchaſe of lands to be ſettled to the uſe of the intended huſband and his wife, and then ſubject to a term of years for raiſing portions for younger children (or without any ſuch term), to the firſt and other ſons of the marriage in tail, and failing ſuch, to the daughters, &c. ſuch capital ſum, till the ſame is laid out, is conſidered as land or real eſtate; and not as money or perſonal eſtate.

Thirdly, Where, under any ſettlement actually made before or after marriage, any lands already purchaſed, or agreed

agreed to be purchased, are in a formal manner made subject to the raising of portions for younger children; and it is there said, that in case there are more such children than one, a particular sum shall be raised for and shall be shared and divided amongst all such children in equal shares and proportions, and that the same shall be paid at their ages of twenty-one years, or on the days of their marriage; unless there is a particular clause directing, that in case any of the said children shall die before they attain their ages, or are married, the portion or share of such children so dying shall go or accrue to the surviving or other children, there such shares of those children who so die under age will not go or survive (as the expression is) to or among the surviving children, but the same shall sink into the land; that is, the land or real estate will be discharged from the raising the same; and this is in order to preserve the landed estate as entire as possible for the benefit of the heir, as will be said under the next head: for,

FOURTHLY, If a portion is so directed to be raised out of land by a deed or will for the benefit of a younger child, son or daughter, to be paid at a particular age, as at the age of twenty-one, or at the age of seventeen or eighteen, or on the day of marriage; there, if such child dies in its tender years, that portion shall not be raised for the benefit of its next of kin, or for the administrators of such child, but shall sink for the benefit of the heir of the family; "for as the donor or testator meant only to "load his family estate with a provision for such younger "child in case he should want it, and such younger child "dying before he came to that age in which he was supposed to have occasion for a provision for his future "livelihood; there could not be within the meaning of "such donor or testator any need to burthen the estate "therewith:" and therefore to burthen landed estates in families the rule of equity is, that such provisions or por-

tions ſhall ſink, and that the land ſhall be diſcharged from raiſing the ſame. This is alſo the reaſon why the ſhares of ſuch portions as are mentioned under the laſt head ſhall not go over or ſurvive to the ſurviving children, unleſs there is a particular clauſe expreſsly directing the ſame ſo to do in caſe of the death of any child in their tender years as aforeſaid.

FIFTHLY, Although in the caſe of an actual ſettlement made before or after marriage, where clauſes of ſurvivorſhip with reſpect to the ſhares of the younger children who die before they attain the days of payment accruing or ſurviving over to the ſurvivors are omitted, a court of equity will not ſupply the omiſſion; yet where there happens to be no more than ſhort articles previous to a marriage, whereby it is agreed that ſuch and ſuch lands ſhall, by ſome future act, be ſettled upon the huſband and wife for their lives, with remainder to their firſt and other ſons ſucceſſively in tail male, ſubject to a term of years or a charge for the raiſing of particular ſums for portions or proviſions for younger children, there, if the parties come to a court of equity for directions how to make the ſettlement, the court will, as I apprehend, ſupply the omiſſion, and direct a clauſe of ſurvivorſhip to be inſerted, directing "that the ſhares of any of the children who die under age, "or unmarried, ſhall ſurvive to and among the ſurvivors," as well as they would (if ſuch a clauſe was omitted) ſupply the want of one directing the truſtees to raiſe maintenance for ſuch children during their minorities. This at leaſt is my private opinion; the ground of which is, that as it is uſual and cuſtomary to inſert all ſuch clauſes, and as articles are only meant to ſerve as heads or inſtructions to counſel how to frame the ſettlement afterwards in a formal manner, the court ought to direct ſuch a ſettlement to be made as is moſt conformable to the approved and known method of practice among perſons converſant in buſineſs.

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I WILL now consider the particular circumstances of this case. The act of parliament here stated, after taking notice (among other things), that it was agreed by the articles that lands were to be purchased with the 60,000l. which was to be paid by earl Cadogan, says, in the recital, that the younger son and the five daughters of the late duke and duchess were severally seised of and intitled to the lands purchased, and to be purchased, with the said 60,000l. as tenants in common, to them and the heirs of their bodies respectively, with cross-remainders of their respective shares, in case of any of their deaths without issue, to the survivors of them, with other remainders over. This is mere matter of recital; and nothing is said, so far as is stated here, in any of the enacting clauses of the act so much as tending to shew that it was the intention of parliament that such construction, with respect to any cross-remainders, should be binding upon, or be admitted on all future occasions by the parties. If there was any agreement between his grace the duke of Richmond on the one part, and the noble persons who were the husbands of his grace's married sisters and the guardians of his grace's infant sisters on the other part, that that construction should be admitted by all the parties, his grace no doubt will be bound by that agreement, and will perform it with all honour; but otherwise I shall impose too difficult a task on myself to say, that this recital is binding upon his grace. The sense of parliament is certainly a great authority; but the recitals in private acts of parliament are often penned by mere agents: and though such acts are generally revised with great care by the Judges, yet in family matters, where all parties are consenting to what is prayed from parliament, one may, without failing in point of candour, very naturally suppose that such abstruse points as what words or sentences would or would not create cross-remainders in articles or settlements were not attended to by the Judges on this occasion,

ſion, eſpecially ſince it was by no means neceſſary for the parliament to bind the parties to admit of that conſtruction, for the purpoſe of making what the parliament was to ordain by that act the more effectual; and that was, "That if any of the unmarried daughters therein mentioned ſhould attain the ages therein expreſſed, or be "married, they ſhould have 10,000l. a-piece in lieu of "their reſpective ſhares in the lands to be purchaſed with "the 60,000l." The act of parliament was obtained for this, and for this only; I am therefore obliged for the preſent to lay the recital in the act of parliament out of the caſe, and to go back to the words of the articles themſelves, directing how the lands to be purchaſed with the 60,000l. ſhould be ſettled; which words are thus: "After "the deceaſe of the ſaid then earl of March and his in"tended lady, to the uſe of all and every the children of "the ſaid earl of March, to be begotten on the body of "the ſaid lady Sarah (the eldeſt, in caſe there ſhould be "any, always excepted), equally to be divided between "them, ſhare and ſhare alike, as tenants in common, and "not as joint tenants, and to their ſeveral and reſpective "heirs of their reſpective bodies iſſuing; and for want of ſuch "iſſue, to the uſe of ſuch eldeſt ſon and the heirs of his body; "remainder to the ſaid earl Cadogan, his heirs and aſſigns "for ever." And I think it a very difficult point to determine, whether a court of equity would or would not have directed ſuch croſs-remainders as are mentioned in the act of parliament to be inſerted in the ſettlement, had there been a ſuit inſtituted in a court of equity for directions how to make ſuch ſettlement.

Lays the act out of the caſe—goes to the words,

I HAVE propoſed in this paper only to offer ſuch hints as ſeem proper to be attended to for the ſolution of the difficulties in this caſe; and it ſeeming neceſſary to me to take into conſideration here what words will or will not create croſs-remainders, either under ſettlements or wills in courts of law, or under articles in courts of equity, I

will

will ſtate ſuch diſtinctions as ſeem to me to have prevailed in thoſe caſes, ſo far as any ſuch now occur to me.

Words neceſſary to create a limitation of a croſs-remainder in a deed after a tenancy in common.

First, The limiting of croſs-remainders after a tenancy in common in a ſettlement to uſes in legal terms, requires a long form of words ſomething to this effect: "That in caſe there ſhall be a failure of iſſue of the body "of any of the before-mentioned perſons who are ſo made "tenants in common, then as to the part and ſhare of the "perſon or perſons whoſe iſſue ſhall ſo fail, that the pre-"miſes ſhall go and remain to the uſe of the ſurvivors and "ſurvivor, and others of them, and the heirs of his and "their body and bodies reſpectively; and for want of ſuch "iſſue of all ſuch perſons, that then the premiſes ſhall re-"main over to ſome third perſon, &c." This is a clear and expreſs limitation of croſs-remainders in a deed.

In a will.

Secondly, But in a will if lands are deviſed to two or more perſons, and to the heirs or iſſue of their bodies as tenants in common ſeverally and reſpectively, and then the teſtator ſays, "and for default of iſſue of both of the "ſaid perſons, or of all of them, that then the ſaid pre-"miſes ſhall go to a third perſon," the law, that tries to follow the intention of the parties, will collect, that as the teſtator did not direct that the lands ſhould go over to a third perſon till there was a total failure of iſſue of both or of all of the preceding tenants in common, he meant that in caſe of the death and failure of iſſue of one of them, the ſhare in the lands of him ſo dying and failing of iſſue ſhould go over to the other tenant in common, and to the heirs or iſſue of his body, before the third perſon ſhould have any actual title to that ſhare; and therefore the law ſays, "that "theſe words, in default of iſſue of both or all of them the "ſaid tenants in common, ſhall create a croſs-remainder "in tail to each of the ſaid tenants in common in their re-"ſpective ſhares by implication;" and therefore the Judges conſtrue ſuch words to operate ſo as to interpoſe a remainder in tail in each of the ſaid ſhares to each of the ſaid

tenants

tenants in common, between the limitations in tail to them severally of their own original shares, and the subsequent limitation of the entirety to the third person.

THIRDLY, But if there are no words in a will of this kind to shew that the testator really meant not to let in the third person or devisee until there was a total failure of issue of the before-mentioned devisees, so by him before made tenants in common in tail, there the third person or remainder-man will be let in upon the death and failure of issue of each tenant in common to the part and share of that tenant in common immediately: as if there is a devise to two men and the heirs of their bodies equally to be divided between them as tenants in common, and for default of such issue, or for want of such issue, or in failure of such issue, to *T. S.* and his heirs; there, if one of the two men dies without issue, *T. S.* shall immediately have his share; for that the words, "in default of such issue," &c. will not of themselves create cross-remainders by implication, their natural meaning being to carry over the several shares of the persons so dying respectively without issue to the last remainder-man, as and when such persons respectively die without issue.

FOURTHLY, Yet in some cases courts of equity will construe marriage articles still more liberally. If *A.* and *B.* agree that the son of *A.* shall marry the daughter of *B.* and they two enter into articles whereby *A.* agrees to pay 20,000l. and *B.* agrees to pay 10,000l. both to be deposited in the hands of trustees, to be laid out in a purchase of lands to be settled to the use of the intended husband and wife for their lives and the life of the survivor, with remainder to the issue of the marriage; and in default of such issue, that the reversion in fee shall go as to two thirds to *A.* and as to the other third to *B.* in fee; there a court of equity will direct that the lands shall be settled so as to go, after the death of the husband and wife, to the first and other sons of the marriage successively in

tail,

tail, with remainder to all the daughters as tenants in common in tail, with a cross-remainder in tail between them all, before the limitation to *A.* and *B.* in fee shall be let in. The reason given for this construction is, that articles previous to a marriage are but as heads or minutes of the agreement of the parties, and that they are only instructions to counsel how to put the future settlement into a formal dress; that as such words are actual minutes for counsel, and would contain sufficient as hints to counsel how to draw the settlement, a court of equity ought to follow the common form.

Hanbury and Price, 1729.

THIS was part of the Case of Hanbury and Price in the time of lord chancellor King; and I think, that if the words of the articles in the foregoing Case had been to settle the lands on the first and other sons successively in tail, and then upon all the daughters as tenants in common, and the heirs of their bodies, and in default of such issue, &c. to *A.* and *B.* in the proportions aforesaid in fee, there a court of equity would have directed cross-remainders among the daughters; but not from any particular operation in construction of the words "in default of such issue," but from other principles of equity formed upon the intention of the parties, who, in prospect of future marriage, had it in view to make provision for the establishment of a family; which was, to have landed property that was to be secured in a course of succession to all the descendants of that family. From all these considerations here will be points and questions of great difficulty.

How far the recital binding.

FIRST, It will be a question how far the recital in the act of parliament shall be binding or not binding. I must be permitted to say, that nothing has hitherto appeared to me to shew, that it was intended by the parties that the construction put upon the articles by that recital was intended to be admitted in the course of such future rights as should accrue to any of those parties under the

said

ſaid articles; but I have not ſeen any actual copy of the ſaid act of parliament.

SECONDLY, If the recital in the act of parliament is to be laid out of the caſe, then the preſent rights either of lady Cecilia's ſiſters and brother to her portion of 10,000l. or of his grace the preſent duke of Richmond to that ſum, muſt, as I conceive, be derived from and governed by the words of the articles, and the intent of the parties thereto; and then it will be a queſtion of very great difficulty, Whether, in caſe the 60,000l. mentioned in the articles had been laid out in the purchaſe of lands, and the ſhares of thoſe lands had been limited to all the younger children of the late duke and ducheſs as tenants in common in tail, there ought in that caſe to have been limitations in nature of croſs-remainders of their ſeveral ſhares among them in tail, before the introduction of the ſubſequent remainder in tail to his grace the preſent duke of Richmond? Were the very words of theſe articles to be tranſcribed into a will, I ſhould think clearly that there would be no croſs-remainders by implication between or among theſe younger children. The words ſeverally and reſpectively point only to the ſeveral eſtates which the ſeveral tenants in common were to take in their reſpective ſhares, ſo as to ſhew that each younger child, and the heirs of his or her body, was to take his or her ſhare as tenant in tail ſeparately and apart, and as a diſtinct ſort of property from the ſhares of their brothers or ſiſters; but thoſe words ſeverally and reſpectively can have no influence upon the queſtion, Whether there ſhall be croſs-remainders by implication, or not? ſo that the queſtion will reſt entirely upon the words *in default of ſuch iſſue*. And I know of no caſe where theſe words alone have been conſtrued to create croſs-remainders by implication. All the Caſes of Holmes and Meynell, Lomax and Holmden, Coomber and Hill, Davenport and Oldys, &c. prove that the words *in default of ſuch iſſue* in a will, or the like, will

Odell and Cook, 2. Vern.

will not of themſelves create croſs-remainders by implication: but theſe words ſtand not in a will, but in that part of marriage articles which makes a proviſion for the ſupport and livelihood, by way of portions, of younger children. This is very different from thoſe parts of marriage articles which direct in what courſe of ſucceſſion that which is intended to be the family eſtate ſhall go to or amongſt the deſcendants and repreſentatives of the intended family; ſo that I think the Caſe of Hanbury and Price, which I have mentioned above in the third head of obſervations upon croſs-remainders by implication, will not govern very much in the preſent caſe. It is a pretty ſtrong circumſtance in favour of croſs-remainders among the children, that if there had been but one younger child, ſon or daughter, that younger child would have had an eſtate tail in all the lands that were to be purchaſed with the 60,000l.; but ſtill this may perhaps be accounted for another way: Why might it not be the intention of the parties to the articles, that if there was but one younger child, ſon or daughter, that child ſhould have the entirety of the whole land to be purchaſed with the 60,000l. to him or herſelf in tail, to aſſiſt in eſtabliſhing a new family; yet if there ſhould be more younger children than one, that each ſuch younger child ſhould have a ſeparate ſhare to him or herſelf in tail, as a proviſion for his or her competent livelihood; but that the benefit of each ſuch particular ſhare, on the death and failure of iſſue of any one child, ſhould go directly to the eldeſt ſon, by way of augmenting his landed eſtate. Whether this is ſufficient to counterbalance the weight of that argument which ariſes from the conſideration of what was the intention of the parties in the event of there being but one younger child, deſerves to be well conſidered.

I SUBMIT theſe thoughts to the parties, who ſeem to me to ſtand upon very debateable ground on the one part as much as on the other. I have as yet formed no Opinion; and

and for the present I decline even the saying whether I incline or not to either side.

Lincoln's-Inn, JA. BOOTH.
21st Jan. 1771.

Mr. PATTERSON'S OPINION.

WHEN a learned Judge has impartially stated the evidence and arguments on both sides, it is the business of a jury (though men of much inferior knowledge) to determine, be the question ever so difficult or doubtful.

As a juryman, therefore, I presume to decide in the Case referred to me only because I must, but with all due deference to the judgment of my very learned friend.

THE Case shortly stated is,

THAT on the marriage of lord and lady March (their eldest son being amply provided for), lord Cadogan by articles covenanted to lay out 60,000l. in the purchase of lands to be settled to lord Cadogan for life; then to lord March, for the joint lives of himself and wife; then, if the lady survived, and there was no child of the marriage, to lord Cadogan in fee; but if she survived and there were children, then, as to half, to lady March for life, and as to the other half during her life, and as to the whole after her death, to the use of the children (except the eldest son), in such shares as lord March and his lady should appoint, so as no child should have less than the value of 10,000l.; and in case of no appointment, then to all the children (the eldest son always excepted), equally to be divided amongst them as tenants in common, and the several and respective heirs of their respective bodies; and for want of such issue, then to the eldest son, and the heirs of his body; and for want of such issue, to lord Cadogan in fee.

LORD and lady March left an eldest son and six younger children, one of whom is since dead and unmarried; upon which the question arises, Whether that child's share of

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the 60,000l. ſhould go to the eldeſt ſon, or ſurvive to the younger children?

In conſidering this queſtion I lay it down, that courts of equity look upon articles only as ſhort minutes or inſtructions to prepare the ſettlement in more ample form; and therefore, on a bill for carrying the ſame into execution, will decree the ſettlement to be drawn agreeable to what they conceive to have been the intention of the parties, and for that purpoſe to inſert ſuch limitations as will effectuate that intention, although not expreſsly directed by the articles.

Thus, where portions are directed to be paid to younger children at certain ages without mention of maintenance in the mean time, equity will ſupply the omiſſion.

Thus alſo (in the caſe now under conſideration) equity would undoubtedly in the ſettlement ſupply truſtees to preſerve contingent remainders, though not mentioned in the articles.

And thus, where by the tenor of the articles it appears that an eſtate intailed upon ſeveral children as tenants in common, was not intended to go to a third perſon until all thoſe children and their iſſue ſhould be extinct, equity will decree croſs-remainders, although not directed by the articles.

In the preſent Caſe, therefore, let us conſider what the parties meant by the words *ſuch iſſue*, on the failure of which the eſtate was to go to the eldeſt ſon.

The word *ſuch* being a word of reference, naturally, and by the common conſtruction, applies to the next antecedent deſcription, which in this caſe is *the ſeveral and reſpective heirs of the reſpective bodies of all and every the younger children.* If therefore the deſcription referred to was ſubſtituted inſtead of the word *ſuch*, the limitation to the eldeſt ſon was to take place upon the failure of the ſeveral and reſpective heirs of the bodies of all and every the ſaid younger children; from whence I conclude, that

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the intention of the parties was to reftrain that limitation till there fhould be none of the iffue of any of the children left.

AND what tends to confirm me in this opinion is,

FIRST, That the primary object of the articles was evidently to provide for the younger children, infomuch that in cafe of an appointment by the father and mother, it is provided that the eldeft fon fhould be always excluded; and therefore any doubtful expreffion ought to be conftrued moft favourably for them.

SECONDLY, That in cafe of an appointment, no child's fhare was to be lefs than the value of 10,000l.; and fo far were the parties from thinking the fhare of any deceafed child too great an addition to the fhares of the furviving younger children, that if there had happened to be but one younger child, fuch child was to have been intitled to the whole eftate.

THIRDLY, That to underftand by the words *fuch iffue* the iffue of any one or more of the younger children, feemed forced and unnatural, and no ways juftified by any rule of conftruction.

FOURTHLY, That this cafe differs from thofe where the bulk of the eftate appears to be intended for the eldeft fon, but burthened with portions for younger children; in which latter inftances the deed ought to be moft favourably conftrued for the heir, and nothing taken from him but what is exprefsly directed; whereas, in the prefent Cafe, the whole is intended for the younger children, and a limitation made to the eldeft fon merely to prevent the eftate returning to the donor.

FIFTHLY, That my conftruction of the words *fuch iffue* receives additional ftrength from the recital in the act of parliament, which is not pretended to be a recital of the words of the articles, and confequently cannot be deemed a mifrecital, but muft be deemed as a legiflative decifion with regard to the operation of the words *fuch iffue*, and confequently

consequently an authoritative declaration of the intention of the parties.

If therefore I am right in my construction, and the parties may be understood to have meant that the eldest son should not succeed till the extinction of all the younger children and their issue, it follows, upon the principles above stated, that a court of equity would in this case decree the settlement with cross-remainders amongst them previous to the limitation to the eldest son.

But I submit my opinion to the learned; happy if any of my ideas may serve as hints to call their attention to a further discussion of a point which one of them has pronounced doubtful.

Price and Allen.

It was argued for the plaintiffs, that in the construction of marriage articles the court of chancery doth not so much endeavour to discover what has been done, as to investigate the true sense of those articles, and from them draw what still remains to be done for completing the intent of the parties.

This cause was heard before lord-chancellor Apsley, in Easter Term 1773.

This court prunes excrescences, amends deficiencies, and carries into execution the scope and purport of the articles.

In the Case of Hanbury and Price lord King did not consider the bare words, but paid regard to the intent of the parties and tenor of the articles.

West and Erissey is in point. Twisden and Locke is similar; where the words were, "to all the children male "and female as tenants in common, and not as joint tenants, "and the heirs of their respective bodies, and for want of "such issue, remainder over."

Lord Cadogan had one general view; which was, to provide for all the younger children of the marriage and their issue, and that in the most liberal manner.

He gave a power of appointment to the father and mother, but gave it in such a manner as to secure an ample fortune to each child, by naming a specific sum as far as the situation of the family allowed; but in default of, or if after such appointment made, any part of the 60,000l. remained undisposed of, To whom was it to go, and how? To all the children equally; nor could the father and mother have deprived an only younger child of a shilling of the money. It is therefore clear, that the younger children of the marriage were the sole objects of the parties, and the only persons intended to be benefited under the articles, which intent he hoped would be the decretal guide.

For defendants it was argued, that this money is still to be considered as land; that the act of parliament had not intended to make any alteration in the general meaning and purport of the articles.

That the recital in the act of parliament giving cross-remainders between the children was of no weight, neither adding to nor diminishing the right of the parties, for nothing is consequential from such recitals in acts of parliament.

It is not contained in the petition to the house, nor did the noble duke or any of the parties intend that any thing contained in that act should in anywise affect, alter, or change, the intent or construction of those articles.

Lord Chancellor observed, that where recitals in acts of parliament relate to matters of fact, they may be controverted, and they that prove not to be so are of no authority; but when they relate to matters of law they are narrowly inspected by the judges, who will not set their hands to what doth not appear to them to be law. The two judges, chief baron Parker and baron Adams, have set their hands to this bill and report; and therefore a recital of a point of law will have more weight, because

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the judges will not let it paſs unexamined. *Vide* page 373, at the N. B.

THE Caſe of marriage articles differs totally from wills and ſettlements.

Mr. WEDDERBURNE, ſolicitor-general, in reply.

THEY are only ſhort minutes for conveyancers, to guide them in modelling the deed in contemplation, and are never intended for an abſolute ſettlement.

THEY contain no legal intereſt, nor do they create any limitations of eſtates to the ſeveral perſons intended to take under them.

THEY only found a right in equity, and are no more than memorandums for aſcertaining the intent of the parties, to be carried into execution under a more formal conveyance, being in themſelves no conveyance of eſtates.

IT follows therefore of courſe, that the particular or technical words made uſe of in marriage articles are of no ſignification, any more than as they ſerve to convey the general intent of the parties.

NOR is the court embarraſſed with the technical ſenſe of words of limitations made uſe of in them.

NOR doth the hitherto-laid-down doctrine, that croſs-remainders cannot exiſt between more than two, affect the conſtruction of them; no ſuch principle having ever yet been laid down in the caſe of marriage articles.

THE words "want of ſuch iſſue" here muſt not be ſaid to refer to the iſſue of the children of lord March and lady Sarah Cadogan only, but to thoſe children and their iſſue.

NOR can eſtabliſhing croſs-remainders here be ſaid to be to the diſinheriſon of the heir at law; for if the duke of Richmond can take the whole or any part of this 60,000l. he takes it under a ſettlement; but if the ſame is to be conſidered as land, lord Cadogan is the ſettler, and his heir at law would be the perſon to inherit that if the ſettlement did not intervene.

THE ſame might have happened in this noble family which happened in one of diſtinguiſhed conſequence in this country.

QUEEN ANNE had ten children; all but one were born alive; every one, except the duke of Glouceſter, died within the week after their birth; but yet each of them would have taken a veſted intereſt under the articles. Suppoſing then five of the younger children had, in our Caſe, died under one year old, and one only ſurvived, Would this court have decreed him to have one ſixth ſhare only of the 60,000l.? which they muſt have done upon the principle contended for on the other ſide; for each infant would by his birth have gained a veſted intereſt, which of courſe would, to the prejudice of the ſurvivor, have become an inheritable eſtate to the general heir of the marriage under the articles. Upon this ground, if there had been eight younger children, or more, the ſhare of the only living child would have been reduced to a ſmaller ſum; yet it is expreſsly directed by the parties that each child ſhall, if circumſtances will allow it, have 10,000l. but it was not intended to abridge any part of that portion for the benefit of the eldeſt ſon, when it is expreſſed that an only younger child would have taken the whole.

IT cannot be concluded, that lord Cadogan had in contemplation to give any part of this to the ultimate taker in remainder, lady Margaret Bentinck, his youngeſt daughter, whilſt there were any children or iſſue remaining of his eldeſt daughter lady March; yet upon the conſtruction contended for ſhe may inherit this preſent ſhare now claimed by the defendant, upon the event of his dying without ſuffering a recovery.

I THEREFORE lay it down as a general principle, that in conſtruction of articles of this nature, a right of ſurvivorſhip exiſts in the caſe of money, and in caſe of a landed property

property that croſs-remainders would be eſtabliſhed between the parties.

THE act of parliament has left matters juſt where they were.

I SUBMIT—that in the preſent Caſe the court will, contrary to the legal import of the articles upon the general intent of the parties, conſtitute croſs-remainders.

N. B. IT was much for defendants that croſs-remainders could not exiſt between more than two by implication; that the rule, however abſurd in its commencement, had been ſtrongly laid down by judge Dodridge, and recognized in the Caſe of   by lord Hardwicke, which warranted the foundation of another decree by lord Hardwicke.

ON the 4th May 1773, lord chancellor Apſley gave his decree in this cauſe.

HAVING ſtated the recognizance entered into by lord Cadogan, the limitations in the articles, the ſtate of the family, and the bill applying to the court of chancery to direct the money to be laid out, the general decree given for that purpoſe, the marriage of lady Caroline Lenox with mr. Fox, &c. and the propoſal made by the duke to mr. Fox, &c. to purchaſe the eſtate, and to ſecure 10,000l. to each of his younger brothers and ſiſters as before mentioned, the reference for that purpoſe to the maſter, and his report of the propoſal, in conſequence of which the younger children petitioned parliament to have ſuch propoſal carried into execution, he proceeded, That the enacting clauſe in the act confirmed the agreement, and directed that the duke ſhould be allowed to purchaſe the eſtate in queſtion, and take the reſidue of the money in the funds, conſiſting of bank annuities, upon paying the portions therein directed to be paid, and ſecuring, as therein is directed, 10,000l. a-piece to each of the younger children, whoſe portion ſtill remained unpaid, and who were under age.

He then proceeded and observed, that the act had made no alteration in the limitations of the articles, but seems to have had in view to confirm them totally.

It is mentioned in the recital, that the younger children are intitled as tenants in common to estates tail, with cross-remainders in case of the death of one or more of them. But though this recital is inserted in the act, yet there is no notice taken of it in the enacting part, which is quite silent as to that question.

It has been argued on the part of the plaintiffs, that the duke of Richmond is bound by this recital. If it had been enacted that cross-remainders were limited between the younger children, though founded upon a misrecital, yet it would have been conclusive against the duke of Richmond, and cross-remainders clearly have been established; though generally recitals in private acts of parliament, or in deeds, are not binding to the parties, nor, as this recital is, has it at all affected the present case; therefore the question is fairly open for the duke to contend, that there were no cross-remainders established under the articles between the younger children, and that as his sister lady Cecilia Margaretta died under age and unmarried, he, as next remainder-man, is intitled to her share of the 60,000l.

But this recital, though not conclusive, will have some weight; for it shews that the persons who prepared and passed the act looked upon the articles in that light; which the court will pay a regard to, though it may not be of opinion that such recitals shall constantly bind.

This court will always consider articles as preparing something afterwards to be completed, and it is the constant rule to look upon them as merely the heads of the points agreed upon between the parties, and as minutes drawn by them to lay before counsel, in order to direct and guide them to carry the intent and scheme of the parties into complete execution; and when application is made to this court

court for that purpose, the court will mould them in such manner as to comprehend what appears to be the manifest intent and design of the parties, not paying a nice adherence to the legal sense or operation of the words which may be made use of in framing the articles. It would be endless to go through all the Cases where this court has interposed, and directed articles made previous to settlements on marriage to be carried into execution directly different from the technical bare sense of words. The Case of Trevor and Trevor, in 1. P. Will. is strong, where the articles were construed directly contrary to the technical sense of the words.

He stated this carefully, and then quoted King *v.* Kingsford on 2d July 1743 before lord Hardwicke, which he stated at large also; and cited West and Erisley, 2. P. Will. 349, at large, to shew how far this court will go in directing the execution of articles made previous to the marriages.

Nor can I find any instance where this court has, upon the construction of articles made previous to marriage, directed a limitation to daughters generally in such articles to be carried into execution without directing cross-remainders to be drawn between the daughters.

The Case of Hanbury and Price shews plainly that was the constant practice of my lord Hardwicke; for in that Case the remainder was to the issue of the marriage generally. But he directed estates tail to be given to the first, &c. sons, with remainder to all the daughters of the marriage, to take as tenants in common, and not as joint tenants, and the heirs of their respective bodies, with cross-remainders in tail.

The words of the articles in this present Case are general and clear, that the parties meant the limitations in the common course of settlement, and the common course in such cases is to establish cross-remainders.

I BELIEVE there is no inftance where crofs-remainders upon articles have not been directed, when application has been made to this court for carrying articles into execution.

IN all the Cafes I can find they have been uniformly granted.

HERE the intent of the parties is moft clear upon the face of the articles, (*viz.*) that the eldeft fon fhould never take any benefit in this 60,000l. while there were any younger children or iffue of the younger children to take. This portion of the young lady is to be laid out in land.

HE then ftated the limitations of the articles. It is plain the intent of lord Cadogan was, that the land fhould not revert to him if there were any children of the marriage to take it; and in that light this 60,000l. ftands juft upon the fame grounds with the 20,000l. limited to younger children by a former part of the articles, which it is moft clear he never was intended to be benefited by any part of, unlefs in the event of a total failure of children of the marriage.

HE then ftated the limitations in the articles, omitting that part of them under the *videlicet* (obferving that ought to be read in a parenthefis), and compared it to the limitation in regard to the 20,000l. with which he obferved it correfponded exactly; arguing from thence, that what was inferted in the parenthefis ought to be read by itfelf, and did make up a diftinct fentence of itfelf: then, having read it, he proceeded to fay, the conftruction to be put upon it was plain and obvious, that as long as a younger child or children exifted the eldeft fon could take no part of the 60,000l.

IF the conftruction contended for on behalf of the duke of Richmond is to be eftablifhed, lord Cadogan might have come into a great fhare of the 60,000l.; for fuppofing there had only been three daughters, younger children

children of the marriage, and that two of them had died infants and unmarried, their ſhare being veſted muſt have gone to the duke; in caſe of whoſe death without ſuffer-fering a recovery, two thirds of this ſum would have went back to lord Cadogan, againſt the expreſs intent of parties. But if the words are ſo plain as to require this conſtruction, the parties muſt ſubmit; and it is inſiſted for the duke that the words of the *videlicet* are ſo plain in his favour, that this court cannot go againſt the technical ſenſe of them.

But I find no ſuch rule, no ſuch Caſe; but that the contrary is eſtabliſhed is true, and this court will always give ſuch words in marriage articles that interpretation which ſeems beſt to concur with the general ſenſe of the parties directing the drawing of ſuch articles, however the legal technical expreſſions may ſeem to militate againſt that conſtructive ſenſe.

In the Caſe cited from Veſey, lord Hardwicke laid it down very fully upon this ground.

It is ſaid that muſt have been the ſenſe of the duke of Richmond and the parties at the time.

But I think the contrary is evident; and upon ſearch I can find no Caſe wherever ſuch an intent was given to the parties by this court in the caſe of marriage articles, but all run upon wills.

He then cited the Caſe of Coomber and Hill, 2. Strange 969. to ſhew, that theſe words are not neceſſarily ſuch technical words as of courſe to be conſtrued to defeat a poſſibility of croſs-remainders, as is contended for by the duke of Richmond; and dwelt much upon the diſtinction made uſe of by lord Hardwicke between expreſs intention and neceſſary implication. He then cited Williams and Brown, 8. Geo. 2. which is ſaid to have been determined on the principles of the Caſe of Coomber and Hill.

Mr. Ford has a good note of this Caſe.

I have a note of the Caſe, and, though a young note-

taker,

taker, find it correſponds with ſerjeant Barnardiſton's note.

NEXT comes Davenport and Oldys, where I find the word *heirs* in lord Hardwicke's note inſtead of *iſſue*, as mentioned by Atkins, vol. i. 579.

LORD HARDWICKE, decreeing in this Caſe, cited only the Caſe of Coomber and Hill, but did not quote it as the grounds of his decree.

THESE are the three Caſes cited by the duke's counſel on his part, and are ſaid to be deciſive in his favour; but upon ſifting them, I am very clear lord Hardwicke did not conſider them ſo clear in point of the technical ſenſe, as not to be liable to have been conſtrued otherwiſe, if the ſenſe of the parties had appeared different.

IT has been ſaid, that there is no difference in the manner of conſtruing wills and articles; but the mode of conſtruction is very different, as appears very plain from the Caſe of Bate and Coleman, 1. P. Will. 142. where lord Harcourt expreſsly takes notice of the difference between a will and articles; and lord Hardwicke recognizes that difference very ſtrongly in the Caſe of Weſt and Eriſſey; articles being always looked upon as mere minutes or heads to direct the counſel how to convey diſtinctly the ſeveral beneficial intereſts and eſtates to the ſeveral perſons intended to be benefited, according to the whole intention of the parties, appearing from the general conſtruction of the whole ſcheme of the articles collected and compared together.

NOW, in my opinion, it is evident, from the whole ſcope of the articles taken at one view, that it was certainly the intent of the parties that lord Cadogan ſhould take no part of this 60,000l. unleſs there was no iſſue of the marriage; and it is equally plain the eldeſt ſon was never intended to be benefited, or to take any thing whilſt there were any younger children capable of taking under that deſcription. But if the ſenſe given the articles by the

defendant

defendant is to ſtand, the reſpective ſhare of any younger child dying an infant and unmarried being veſted, would have gone over to the preſent defendant, the duke of Richmond, during the exiſtence of the preſent younger children of the marriage; from which circumſtance the conſtruction contended for on the part of the duke appears to be entirely contrary to the ſpirit of the articles taken collectively and together.

THE recital, as I obſerved before, has ſome weight; it contributes therefore to ſtrengthen me in this opinion; and though I do not abſolutely think the duke is bound by it, yet I cannot help laying ſome ſtreſs upon it, being thoroughly convinced that the two learned judges who paſſed the act maturely conſidered the ſcope of the articles; and it was manifeſtly their opinion, that that conſtruction which I have laid down was the true conſtruction to be given to the articles.

Lord chief baron PARKER and baron ADAMS.

IF the point was not clear, it was at leaſt their opinion. It is true, they had not heard the matter argued by counſel; but no doubt they ſettled the act with proper attention; therefore it has its weight.

THEY are both great men, and well verſed in the practice of a court of equity: I am ſatisfied with their opinion, and they permitted croſs-remainders to be inſerted.

AND I collect the ſenſe of the articles from the ſpirit of the whole, from which it is as plain as poſſible the eldeſt child was never intended to take any ſhare of the 60,000l. ſo long as there remained a younger child in being to take, under the expreſs words of the articles themſelves; for if there had been one younger child only, that child was to have taken the whole.

THE poſſibility of the greateſt part of the money going to lord Cadogan, which I mentioned before, and the clear direct intent of the articles that that event ſhould never happen while there was any iſſue of the marriage, corroborates

borates me in this opinion, and ſeems to me concluſive in favour of that ſenſe which I have given to the articles.

" THEREFORE let it be decreed, That the duke pay
" the 10,000l. amongſt the younger children, *viz.* 2000l.
" a-piece, with accruing intereſt at 4l. *per cent.* from the
" death of lady Cecilia.

" LET the coſts be paid out of the 10,000l. as between
" client and ſolicitor, and the reſidue equally as before."

A DOUBT was ſtated as to lady Sarah Bunbury's ſhare, ſhe being under articles of ſeparation from her huſband.

BUT the chancellor obſerved, That made no difference, her huſband being nevertheleſs intitled to receive what perſonal eſtate came to her. In her caſe perhaps ſome agreement is made to the contrary.

WEDDERBURNE. THE ſtrict way in theſe caſes is, to order the money to be paid into this court till the maſter makes his report whether the ſettlements made on the reſpective marriages of the ladies intitled is adequate; becauſe, if not, a further proviſion may be made for them from the ſum to be paid in.

Chancellor. BUT perhaps it is not neceſſary in this caſe.

Solicitor general. IT had better be done in the uſual way.

Lord chancellor. THEN be it ſo.

Vide Staples *v.* Maurice, Dom. P. 1774.

No.

No XIII.

The RULES *of* CUSTOMES *pertaining unto* WEST-SHEEN, PETERSHAM, *and* HAM *.

THE rule of custômes made the first day of May in the fourth year of the reign of King Edward the fourth, which customes were granted heretofore by the King and Kings unto the tenants belonging unto the Lordships of Westsheen, Petersham, and Ham; which we the tenants do hold our land by the said customes, &c. MANORS, granted by the King and Kings, time out of mind, as hereafter followeth, *viz.*

I. IMPRIMIS, it was granted to our customes, that we should have a court yearly, at the will of the lord; and that all the tenants thereto belonging shall thither resort upon a fortnights warning, by a precept made by the steward directed to the bailiff, and he to give warning against the day; and those that come not at the said day so warned by the bailiffs shall forfeit the first court two-pence, the second four-pence, the third court six-pence, and so double every court his forfeit.

II. THE second part of our custom is, that when the steward and the lord with the Kings tenants be assembled in the face of the court then called together by name and sworn, that then the said homage shall enquire weither that any of the Kings tenants be deceased, and to present his name and next heir, or whether he died seised or not.

III. THE third part of our custom is, that if any tenant do die so seised, that he dieing so seised, then that which descended ought of right to descend by custom of our Manor to the youngest son and his heirs, and if he have no

* The present article is here printed from a copy taken from a record remaining in the Tower.

son,

ſon, to the youngeſt daughter and her heirs; and if ſhe die without iſſue, to remain to the next of his kin; and if there can none of the kin be found, then to make claim to the lord, that then the lord ſhall by our cuſtom ſeize it into his hands as eſcheat for lack of heirs general; and then the lord of his ſpecial grace may grant ſeiſure to whom he liſteth, upon a new fine levied to them and their heirs for ever.

IV. The fourth part of our cuſtom is, if the ſaid tenant do die without iſſue, and alſo ſeiſed, having a wife which ſurviveth him, and if the ſaid wife do come into the ſaid court and make claim unto the lands after the deceaſe of her huſband, then ſhe might have by our cuſtom of the heir, the third part of the rent during her life; and if there be no heir to be found, then ſhe is to have it of the lord.

V. The fifth part of our cuſtom is, that if any tenant will deliver a ſurrender before his death unto the uſe of his wife, or to his heirs, that then he muſt deliver it up into the hands of two of the Kings tenants of the ſaid lordſhip; and if he deliver it but to one, that ſtands void and of none effect, except it be in the extremity of death: and further, when the ſaid tenants have received it to the uſe of their wives or their heirs whom they liſt to make it unto, the ſaid tenants ſhall bring in the ſaid ſurrender at the next court holden after the date thereof, or elſe the ſaid ſurrender to be void and of none effect.

VI. The ſixth part of our cuſtom is, that we hold our lands by the rod, or coppy of court roll, by cuſtom of our manor at the will of the lord; and that we may lop, top, fell by the ground, wood and timber, and carry it away without any forfeit makeing of lands and houſen, ſo that we do keep the houſen in ſufficient repairations; and if we do not keep the repairations, then ſhall the lord ſeize it into his hands, and take the profits thereof unto his own uſe, untill ſuch time as we have ſufficiently repaired them,

then

then to fine with the Lord and so to have our lands again, without any interruption on any part made by the Lord or his assigns after that we have payed our fine.

VII. The seventh part of our custom is, if any tenant that holdeth land of our sovereign Lord the King do sue it out of the said court without licence of the Lord of the soyle, he to forfiet all his copyhold which he hath lying within the Lordship, except it be brought by the commandment of the King or of his most honourable Counsell, and furthermore, whether he came to it by inheritance or purchase, and so holdeth it to him, his heirs, or assigns, and so at the time of his death to deliver a surrender unto his next heir, and if so be that after the death of any such tenant the heir doth give, set, or lay to mortgage, any copyhold lands lying within any of the Lordships, before the said heir be admitted tenant and hath paid his fine, according to the said customs of the manor of the said lordships, that then all such said surrender and mortgage made by the said heir shall stand clearly void and of none effect, by our custtomes.

VIII. The eighth part of our custom is, that the Lord of the soil may lett, and sett, all manner of waste and void ground, by coppy to any man that will take it, paying a fine to the Lord, and yearly quit rent to the King, for the Lord is bound to augment the Kings quit rent one year better than other by our custom, within any of the said three Lordships.

IX. The ninth part of our custom is, that all our lands arrable, and unarrable, which lieth abroad in the common fields, is as common once a year, except certain closes, which lieth inclosure; and for all the common fields one tenant to enter common with another in all vacation times, but not betwixt our Lady day in Lent, and Michaelmas: and every man that holdeth of the Lord a tenement of land shall common by our custom three sheep upon an acre,

 that

that is to say, sixty-eight upon a tenement, and four oxen, three kine, two horses, one mare or gelding, and that no man which hath sold all his land from his house shall common for no more but his bare house, that is to say, three kine, one mare or horse, and no more no man shall keep by our custom.

X. THE tenth part of our custom is, that if any tenant holding lands of our sovereign Lord the King, within any of the Lordships, do cast down any parcel of freehold lying between two parcels of coppyhold to the intent to make the copyhold land freehold, then the tenant so doing shall forfit all his coppyhold land lying and being within the said Lordships, by our customs.

XI. THE eleventh part of our custom is, that any tenant shall top wood, fell furze or thorns within the several Lordships portion and portion alike, and to carry home to their own houses for their own use; and that no man or woman keeping a common brew-house, or bake-house, fell no manner of wood, or furze, or thorns, to bake or brew withall, except he be a tenant in land, he shall have no more in the common than his tennure will give, according to our custom.

XII. THE twelveth part of our custom is, that the quit rent of the land belonging to the Lordship of Westsheen, is two-pence the acre, and six-pence the house without land, the fine of the said Lordship is two years quit rent. The quit rent of Petersham, and Ham, is four-pence the acre, and six-pence the house, and the fine is one years quit rent, every tenement is seven shillings and six-pence by our custom. And unto all these customs we the said tenants of the Lordship, we all do hold and affirm, by the grant of the King and Kings time out of mind.

AND for further assurance our heirs for ever that shall come after us, we have put it in writing for a continual

rethem-

remembrance, done before John Judgell, one of the Kings honourable Counsell, and John Warman, then the Lord of the soil for the time being. IN WITNESS whereof John Hart, tenant, William Ballat, tenant, John Howe, tenant, John Brewell, tenant, William Thorn, tenant.

A most true Coppy from the Antient Original Coppy to be produced on all great and necessary Occasions.

No. XIV.

ARGUMENTS *of the* LORD CHANCELLOR *, *and* *of the* LORD CHIEF JUSTICE *of the* KING'S BENCH †, *in the* DOUGLAS CAUSE, *in the* HOUSE *of* LORDS, FEB. 27, 1769 ‡.

LORD CHANCELLOR.

THE Cause before us is, perhaps, the most solemn and important ever heard at this bar. For my own share I am unconnected with the parties; and having with all possible attention considered the matter both in public and private, I shall give my Opinion with that strictness of impartiality to which your lordships have so just and equitable a claim. The question before us is, "Is the appellant the son of the late lady Jane Douglas, or not?" I am of the mind that he is; and own that a more ample and positive proof of a child's being the son of a mother never appeared in a court of justice, or before any assise whatever.

THE marriage of lady Jane to colonel Stewart, August the 10th 1746, is admitted on all hands. Her pregnancy in January 1748, and the progress of it, were observed by many people: at Aix la Chapelle it was notorious; her stays were widened; the nuns of the convent of St. Anne's discerned it, notwithstanding lady Jane's modesty; the

* Lord Camden.

† Lord Mansfield.

‡ The following Arguments gave occasion to the production of a publication intitled, "Letters to Lord Mansfield;" in which the arguments in favour of the Appellant are very strongly controverted, and the conduct of the Guardians of the Duke of Hamilton, in bringing this memorable cause to an issue, is vindicated with great force and elegance.

maid

maid servants are positive as to the fact; the earl of Crawford wrote an account of it to the duke of Douglas, not as an hearsay, but as a fact, of which he himself was fully satisfied by ocular inspection: and if there be a pregnancy, there must be a delivery; which accordingly happened by the positive evidence of mrs. Hewitt, who has deposed, that "she received them into her lap as they came from lady Jane's body." She was delivered of twins on the 10th of July 1748, at Paris, in the house of madam la Brun, in the Fauxbourg de St. Germain. Lady Jane's ability to bear children is established by many witnesses; and a miscarriage after the birth of the twins, still more and more proves the delivery.

But, my lords, there is another proof no less convincing that the appellant is really the son of lady Jane, and this arises from the uniform tenderness shewn towards him. 'Tis in proof that on every occasion she shewed all the fondness of a mother: when he casually hit his head against a table, she screamed out and fainted away: when her husband, the colonel, was in prison, she never wrote to him without making mention of her sons: she recommends them to clergymen for the benefit of their prayers: is disconsolate for the death of the youngest: takes the Sacrament: owns her surviving son: does every thing in her power to convince the world of his being her's: blesses and acknowledges him in her dying moments, and leaves him such things as she had[1]. Sir John likewise shews the same tenderness in effect; he leaves him 50,000 marks by a bond in September 1763, ten years after the death of lady Jane; and on his death-bed solemnly declares, before God, that the appellant is the son of lady Jane; "I make "this declaration," said he, "as stepping into Eternity." A man that is a thief may disguise himself in public, but he has no occasion for any mask when in private by himself.

1 See p. 17, Letter I.

THESE positive declarations convinced the duke of Douglas, and he left his dukedom and other estates to his nephew, the appellant, who was regularly served heir thereto in September 1761, when he was possessed of all the birth-right of a son, so far as the oaths of witnesses, the acknowledgment of parents, and an established habit and repute could go. The cruel aspersions thrown out against lady Jane and the colonel had been refuted by the late duke of Argyle and the countess of Stair[2]. No mortal doubted the appellant's being the son of lady Jane, except Andrew Stuart; his father, Archibald Stuart; major Cockran, who is married to Stuart's sister; White of Stockbriggs, a principal actor in these scenes. These doubted the matter; and ———, as by concert, went over to France, not to procure evidence of a real fact, but to suborn witnesses to establish an article that never existed, except in their own imagination: the design was bad, and the means to accomplish it were no less criminal. 'Tis needless to follow the searcher through all the scenes of his enquiry; the result of which was to return to Scotland, enter an action against the appellant, and bring his own father to condemn him, at a time when the old gentleman was in a condition every way deplorable[3]. And taking advantage of his inaccuracies, he makes a second tour to Paris, where he published a *monitoire* entirely to seduce witnesses, and influence them to commit the blackest perjury. In this paper he describes the person of sir John Stewart, lady Jane Douglas, and of mrs. Hewitt; asserts that they had purchased two children, whom they wanted to impose upon the world in order to defraud a real heir of an immense estate and fortune; and inviting all who could give light into the matter to come to his lodgings, which he particularly described.

MR. STUART certainly appeared like the guardian of the duke of Hamilton: a pompous title, which drove se-

[2] See p. 20. and 21.

[3] See p. 33.

veral to their own deſtruction, and in hopes of a reward. Among the number of thoſe was madam Mignon, a glaſs manufacturer's ſpouſe; who, after converſing with Andrew Stuart and his clerk, and receiving preſents from them, comes in before the *Tournelle Criminelle* and depoſes, that ſhe had ſold her own child to foreigners whom ſhe did not ſo much as know. "Can a woman forſake her "ſucking child?" is a rhetorical remonſtrance handed to us from the higheſt authority. The thing is incredible, and yet the woman has ſwore it!—a circumſtance ſufficient to render her teſtimony of no force when oppoſed to the dying declarations of lady Jane Douglas and colonel Stewart, and to the poſitive oath of mrs. Hewitt, whoſe character is eſtabliſhed[4] upon a very good foundation: but take the declaration of madam in all its extent, yet ſhe has ſaid nothing to affect the appellant; the time when, the people to whom, with every other circumſtance, prove her not to have been the mother of the young gentleman; his complexion, the colour of his eyes and hair, prove that he was not her's. The ſame thing might be ſaid of the ſon of Sanry the rope-dancer, whom the counſel for the reſpondent would infer to be the child Sholto, the younger of the twins; and, as a ſtrong proof of the ſame, urged, the two were but the ſame identical perſon under different names; and your lordſhips were intreated to keep in your view the rupture under which each of them laboured in order to prove the identity! But how comes all out? Sanry's child could ſpeak in November 1749, but Sholto could not utter a word for ſome months after he came to Mrs. Murray's houſe in December 1749. And now evidence is offered to be produced at your lordſhips' bar, that the child Sholto had no rupture in 1749; nay, that he was as ſound as any perſon within theſe walls: certainly mr. Murray, the moſt material witneſs in this affair, is more to be credited than madam.

4 See p. 234

 YOUR

Your lordships have heard much ingenuity displayed in order to prove that lady Jane's pregnancy was imaginary; the symptoms are allowed, but the reality is now denied; though once Andrew Stuart himself was forced to acknowledge that lady Jane was actually with child. If lady Jane, or any other woman, had such symptoms, it is impossible she could have been eased of them so soon in any other manner as by a delivery; had she been ill of a dropsy, her bulk would not have been totally diminished in so short time as from the 2d of July to the first week in August; when all who saw her at Rheims concluded that she had but lately lain-in. Great stress has been laid upon the letters said to have been forged in the name of Pierre la Marre, the man midwife, the person who delivered lady Jane. I admit them to be forged, and yet this forgery is with me a proof of lady Jane's innocence. Sir John's hardships are admitted; and if he, after so long a confinement, should cause the letters that had passed between La Marre and himself to be transcribed, in order to amuse himself or to satisfy lady Jane that they were not lost, it was no way criminal. Lady Jane received them; but observing they were not originals, she laid them by: so conscious was she of her own innocence that she did not use them; nor ever would they have made their appearance had it not been for the conduct of Andrew Stuart, who, upon getting an order to search lady Jane's repositories, found out these letters, produced them in court to sir John, when under all the miserable circumstances of a man groaning under a load of years, infirmities, and the acutest pains.

The evidence of Godfroi, the landlord of the *Hotel de Chalons*, in the *Rüe St. Martin*, is contradictory and inconsistent, his books being every way defective and erroneous [5]. Nor does Andrew Stuart appear in a favourable light in this particular: when first he came to Godfroi's house,

[5] See p. 45.

house, both the man and his wife were ignorant of the matter; neither the one nor the other recollected lady Jane Douglas or her husband, till Andrew Stuart, desiring a sight of the *Livre d'Inspecteur*, he found two articles, one of them *mr. Flurall, Escoissois, et sa famille sont entré 8me Juillet* 1748; and this he positively affirms, with oaths and imprecations, to be the hand-writing of sir John Stewart, with which he pretended to be thoroughly acquainted; but he was obliged to retract when other postages were found to be of the same hand-writing: this postage was found to be posterior to one written on the 12th, and the landlady of the house declared that she herself had marked it down. He had fifteen rooms and ten closets, which they pretended always to be full, and yet in their book it does not appear there was above three persons in them during colonel Stewart's abode; and what is pretty strange, they had many women-lodgers during that year, and yet they depose they remember none but this lady whom Andrew Stuart would have to be lady Jane Douglas. They even differ with respect to the names of their servants. The counsel at the bar have acknowledged the inaccuracy of the books, owing to the avocations of the man elsewhere, and to the inadvertency of his spouse, continually hurried by a multiplicity of business. Besides, a postage in a book such as the *Livre d'Inspecteur*, which, like a waste book, contains things just as they occur; or the *Livre d'Epense*, to which the articles of the former are transferred; bear no manner of convincing proof that the persons mentioned in these staid at such and such places, it being a customary thing to mark down the name of the person the moment he takes the lodging; and it is notorious that many persons have paid a week, nay a month's lodging, without sleeping a night in it; and this is no more than equity, since the same was reserved for their use.

But here, my lords, the pursuers in this affair have destroyed their own cause; they have brought a sort of proof

proof that lady Jane Douglas was at Michelle's house, called *Le Petit Hotel d'Anjou*, in the *Rüe Serpente*, *Fauxbourg St. Germain*; and this at the very time when they would prove her to have been at the house of Godfroi, of whom so much has been said and heard. Michelle and Godfroi disagree in every thing except in the irregularity of their books; and indeed it is hard to say which of the two excels most in that particular. But not to insist on the irregularities, it is proved to be the practice in Paris, and of Michelle in particular, to write people's names in these police books as entered on the day the room was hired, though the person does not enter for some days after.

To insist on these things, my lords, is tedious; and yet the importance of the case requires it. One madam Blainville swears, that on one of the days between the 8th and 13th of July she accompanied lady Jane in a coach to take a view of Versailles, and at another time to see the *Palace de Vendome*; but this witness is in every respect contradicted by a multiplicity of evidence; and in every view her testimony appears to be absurd and preposterous. First, she is contradicted by mrs. Hewitt, whose deposition bears great weight with me, as also by other witnesses. For, first, she, Blainville, says, that sir John and his family were eight days in Michelle's before the child was brought to the house; whereas Michelle's family all swear that he was brought next day. Secondly, she says, that the child was given to the nurse La Favre the very night of his arrival; that she saw her carry him home with her, and that lady Jane visited him in the nurse's house; whereas, on the contrary, it is proved, that Favre remained four days at the hotel, during which period lady Jane went nowhere abroad. Thirdly, she deposes, that no person visited sir John and lady Jane during their stay at Michelle's; whereas, by the oath of madam Favre, a gentle-

gentleman visited him there: but be that as it may, lady Jane was delivered on the 10th of July; and Blainville does not say she went to Versailles till the 27th; and it is no new thing for a lady, however delicate, so long after delivery, to go so far in a country where the weather and roads are so remarkably fine, and the carriages every way easy and convenient.

ALL these objections to the reality of the appellant being the son of lady Jane are imaginary, and hitherto have been refuted, to the honour of the innocent, and the more firmly establishing him in the possession of his birthright. They only tend to render her virtues more brilliant and illustrious; for as the allegations never existed in fact but in the imagination of Andrew Stuart, so when put to the trial they must necessarily fall to the ground. Thus he has asserted, that colonel Stewart received 350l. from the earl of Morton's banker some days before lady Jane's lying-in, and from thence would infer that her delivery in madam Burn's, an obscure house, was only to carry on the imposture; but now it appears that this money was not paid till sixteen days after. How unfortunate for the duke of Hamilton to be under the direction of such a man! one who has involved him in such an immensity of expences! and this by examining a multitude of witnesses upon articles really foreign to the cause; which indeed is not the duke of Hamilton's, it is the cause of Andrew Stuart, who has acted so strange a part as well deserved the observation made at the bar with great propriety, "that if ever I was to be concerned in any business with "him, I should look upon him with a jealous eye." I shall not follow the noble lord who spoke last through the various descriptions he has given us of midwifery. His observations may be just, but they cannot affect the character of lady Jane Douglas, or the cause of the appellant, her son. The question before us is short: Is the appellant

pellant the ſon of lady Jane Douglas, or not? If there be any lords within theſe walls who do not believe in a future ſtate, theſe may go to death with the declaration that they believe he is not. For my part, I am for ſuſtaining the poſitive proof, which I find weakened by nothing brought againſt it; and in this mind I lay my hand upon my breaſt and declare, that in my ſoul and conſcience I believe the appellant to be her ſon.

THE duke of Bedford then ſpoke in favour of Andrew Stuart's procedure, and in commendation of the *Tournelle*; which finiſhing in about forty minutes,

LORD MANSFIELD ſpake to this purpoſe:

MY LORDS,

I MUST own that this cauſe before us is the greateſt and moſt important that occurs to me: it is no leſs than an attack upon the virtue and honour of a lady of the firſt quality, in order to diſpoſſeſs a young man of an eminent fortune, reduce him to beggary, ſtrip him of his birthright, declare him an alien and a foundling. I have ſlept and waked upon the ſubject, conſidered it upon my pillow, to the loſing of my natural reſt; and, with all the judgement I was capable, have conſidered the various articles that make up this long and voluminous cauſe, upon which I am now to give my Opinion before your lordſhips.

I apprehend, that in the matter before us three things are to be conſidered—the ſituation of lady Jane before her delivery, at her delivery, and after it was over—to all which the chancellor has ſpoke with great propriety. It is proved, beyond a poſſibility of doubt, that ſhe became pregnant in October 1747, at the age of forty-nine years; a thing far from being uncommon, as is atteſted by phyſicians of the firſt rank, and confirmed by daily experience; and that in the month of July ſhe was delivered of twins, one of whom died, the other is ſtill alive: he has

has been presented to the world by sir John Stewart and lady Jane Douglas as their son; nor can he be wrested from the hands of his parents, unless some other had in their life-time claimed him as their child in a legal and justifiable way.

This action, my lords, did not lie against the appellant as an impostor; for an impostor, in the sense of the law, is a person who wilfully and knowingly pretends to be a different one from what he really is, in order to defraud another, and to impose, under a fictitious name, upon the public. If any be an impostor it must have been lady Jane, whom they ought to have prosecuted in her life-time, and not at the distance of nine years after her death. The method of discovering an impostor is to bring his accomplice to the court before which the impostor was arraigned; and if, after a fair trial, the accused person be found guilty, let him take the consequences thereof: but this the respondents have neglected: the appellant has been for five years four months and twelve days the acknowledged son of lady Jane Douglas, and for thirteen years and two months the son of sir John Stewart, before any attempt was made to rob him of his parents, his birth-right, and his all.

As the lord chancellor has anticipated much of what I intended to speak upon this subject, so I shall only touch at the situation and character of the deceased, whom I remember, in the year 1750, to have been in the most deplorable circumstances. She came to me (I being solicitor-general) in a very destitute condition, and yet her modesty would not suffer her to complain. The noblewoman was every way visible, even under all the pressure of want and poverty. Her visage and appearance were more powerful advocates than her voice; and yet I was afraid to offer her relief, for fear of being constructed to proffer her an indignity. In this manner she came twice to my house before I knew her real necessities; to relieve which

which now was my aim. I spoke to mr. Pelham in her favour; told him of her situation with regard to her brother the duke of Douglas, and of her present straits and difficulties. Mr. Pelham, without delay, laid the matter before the king. The duke of Newcastle, then being at Hanover, was wrote to; he seconded the solicitation of his brother. His majesty immediately granted her 300l. *per annum* out of his privy purse; and mr. Pelham was so generous as to order 150l. of the money to be instantly paid. I can assure your lordships that I never did trouble his majesty for any other. Lady Jane Douglas was the first and the last who ever had a pension by my means. At that time I looked upon her to be a lady of the strictest honour and integrity, and to have the deepest sense of the grandeur of the family from whence she was sprung; a family conspicuously great in Scotland for a thousand years past *; a family whose numerous branches have spread over Europe; they have frequently intermarried with the blood royal; and she herself was descended from Henry VII. I took care that his late majesty should be made acquainted with her family and name, to the intent that, though she was married to colonel Stewart, a dissipated and licentious man, and who had been in the

* The rise of this family was in 767, when Donald Bane (i. e. White) came from the Western Isles with a considerable army, and laid waste the open country with fire and sword. Solnathius, the then king, raised forces, and came up with him at a place called Buna, in Argyleshire. The royalists were routed, till a certain person stood in a defile with a spear, calling out to the fugitives to stop: some of the bravest men crowded towards him, and with these he fell upon the pursuers with a bravery that was irresistible. His corps was augmenting every moment, and the victory was snatched out of the hands of the conqueror. When the particulars of the action came to be related to the king, he desired to be shewn the man who had made the first stand; he was answered by one of his attendants, in the Erse language, the then *vernaculum* of the country, (" Sholto ser " Douglas!) Behold that black grey man!" On this he was called before Solnathius, who gave him the name of Sholto, and that part of Lanerkshire now known by the name of Douglas.

rebellion

rebellion 1715, yet he would pass it over, as she was of a race who had always been eminently loyal, her brother having charged as a volunteer at the head of the cavalry in the year 1715; when his cousin the earl of Forfar died like an hero in defence of the government; and that his grace had, in the year 1745, treated the rebels and their leader with contempt and ridicule.' And indeed his majesty, from his wonted magnanimity, spoke nothing of her husband, but treated her with all the respect due to a noblewoman of the first rank and quality; one who carried all the appearance of a person habituated to devotion, and for a number of years trained up in the school of adversity and disappointment.

Is it possible, my lords, to imagine that a woman of such a family, of such high honour, and who had a real sense of her own dignity, could be so base as to impose false children upon the world? Would she have owned them on every occasion? Was ever mother more affected for the death of a child than she was for that of Sholto, the younger of her sons? "Will you," said she, "indulge me "to speak of my son?" and cried out with great vehemency, "O Sholto! Sholto! my son Sholto!" And after speaking of his death, she said, "She thanked God "that her son Archy was alive! What, said she, would "the enemies of me and my children say, if they saw me "lying in the dust of death upon account of the death of "my son Sholto? Would they have any stronger proof of "their being my children than my dying for them?" She still insisted, that the shook she had received by the death of Sholto, and other griefs she had met with, were so severe upon her, that she was perfectly persuaded she would never recover, but considered herself as a dying woman, and one who was soon to appear in the presence of Almighty God, and to whom she must answer. She declared that the children Archy and Sholto were born of her body; and that there was one blessing of which her

enemies

mies could not deprive her, which was her innocency; and that ſhe could pray to Almighty God for the life of her other ſon; that ſhe was not afraid for him, for that God Almighty would take care of him! and what is remarkable, the witneſs, Mary Macrabie, obſerved, that the grief for the loſs of her child grew upon her. Would ſhe, my lords, have bleſſed her ſurviving child on her death-bed[6]? Would ſhe have died with a lie in her mouth and perjury in her right hand? Charity, that thinketh no evil, will not ſuffer me for a moment to harbour an opinion ſo cruel and prepoſterous. Or, can we ſuppoſe that two people who had not wherewith to ſupport themſelves, would be ſolicitous for, and ſhew all the tenderneſs of parents towards the children of creatures who, forgetting the firſt principles of inſtinct and humanity, had ſold their children to people whom they did not ſo much as know by their names. The act of Joſeph's brethren in ſelling him is repreſented as wicked and unnatural; but indeed the crime of madam Mignon and of madam Sanry is ſtill more black and atrocious. To carry this a little further, ſuppoſe lady Jane Douglas had acted this out of a principle of revenge towards the family of Hamilton, yet ſir John Stewart had no occaſion to do ſo, much leſs continue the vindictive farce after her death; eſpecially when married to another ſpouſe. And here we may ſee ſir John as much a parent to the appellant as lady Jane; he was every way fond of him; it is in evidence; I know it to be true: my ſiſter and I have been frequently at mr. Murray's with them, and were always delighted with the care we obſerved. No mortal harboured any thoughts of their being falſe children at that time; I mean in 1750 and 1751. Every perſon looked upon them as the children of lady Jane Douglas and of colonel Stewart. The counteſs of Eglinton, lord Lindores, and many others, have, upon oath, declared the ſame thing.

[6] See p. 17.

No

No sooner does the colonel hear of the aspersions raised at Douglas castle, and of mr. Archibald Stuart's swearing that count Douglas, a French nobleman, had informed the duke of Douglas that they had been bought out of an hospital, than he returned an answer to mr. Loch, who gave the intelligence in a letter to mrs. Hewitt, and wrote him in all the terms of a man of spirit cordially interested in the welfare and happiness of his son. Both he and lady Jane begged the favour of chevalier Douglas, a French gentleman and officer, then at London, to acquaint his cousin the count with what was said of him. This the chevalier undertook, and fulfilled with the fidelity of a man of honour; and the count, in consequence of the application, wrote a letter, not only to lady Jane but to her brother the duke, in all the language of politeness and humanity, disowning what was said of him[7].

But, my lords, the duke of Douglas himself was fully satisfied of the appellant's being the real son of his sister lady Jane; for, on beginning to be known after his marriage, and to relish the pleasures of social life, he became very inquisitive "about the size, shape, and complexion "of the appellant, and if he appeared to be a smart boy." He employed sir William Douglas, and others in whom he could confide, to inquire of mrs. Hewitt, lady Jane's companion, and of Euphemia Caw and Isabel Walker, the two maid-servants who had lived with them when abroad, and observed their conduct in the most unguarded moments, concerning the birth of the children; he even searched into the characters of these; and it appears, from the depositions of clergymen and gentlemen of the first rank in that country, that they were women worthy to be believed[8]. He even went in person to visit mrs. Hewitt, conversed with her in presence of his gentleman, mr. Greenshiells, concerning his sister's delivery; and the accounts given by these, like the radii of a circle, all pointing toward one and the same centre, confirming the reality

[7] See p. 22. Letter I.

[8] See p. 25. Letter I.

ality of lady Jane being the mother of the young gentleman, he was ſatisfied, acknowledged him for his nephew, and left him his heir.

If the duke of Douglas, after ſo ſerious an inquiry, was convinced, why ſhould not we? 'Tis true, his grace has ſometimes expreſſed himſelf warmly againſt the ſurname of Hamilton even in lady Jane's life-time, but never ſo warmly as to prefer a ſuppoſititious child to the duke of that name*; for he only declares, "that if he thought the "children were lady Jane's, he would never ſettle his eſtate "on the family of Hamilton;" nor did he, till after detecting the frauds and conſpiracies that had been ſo long and ſo induſtriouſly carried on againſt his ſiſter and himſelf, make any alteration in his firſt ſettlement.

After the duke's death, the appellant was ſerved heir to his uncle, according to the form preſcribed by the law of Scotland, upon an uncontroverted evidence of his being the ſon of lady Jane Douglas, takes poſſeſſion of the

* From mr. Greenſheil's memorandum, in page 897. of the Defender's Proof, it appears, that White of Stockbriggs, a creature of Archibald Stuart's, aſſured the duke of Douglas, that lady Jane had hired a mob together about his lodging at Edinburgh; that on the firſt news of lady Jane's having borne two ſons, ſeveral people, in the intereſt of the Hamilton family, aſſured his grace that the thing was impoſſible at her time of life; that theſe children were bought out of an hoſpital; that Stockbriggs frequently inſiſted in this manner; that duke Hamilton and major Cockran confirmed the ſame to be true (ſee pages 13 and 20 of Firſt Letter); that his grace often declared, "That it was pity that his eſtate ſhould "go to people who would not thank him for it; and if they had the ſame "in their hands, they did not care if he was hanged, dead, and damned." His grace bore the higheſt perſonal regard for that duke of Hamilton who died at Bath anno 1743, and who was one of the fineſt men of the age; but he had not the ſame regard for that duke's ſon; for after the rebellion his averſion was ſo viſible, that he would not receive a viſit from him, except when he pleaſed. The diſguſt aroſe from duke Hamilton's going over to Liſbon at the time when the Pretender's ſtandard was ſet up, and never returning till all was over. When, on his firſt going to court, he ſolicited the life of the unfortunate earl of Kilmarnock, the king himſelf intimated to him this part of his conduct.

eſtate,

eſtate, and is virtually acknowledged heir by the earl of Selkirk, and by the duke of Hamilton's guardians themſelves; for theſe enter actions before the court of ſeſſions, declaring their right to certain parts of the eſtates, upon ſome antient claims which the Judges there declared to be groundleſs; but in the whole action there was not the leaſt intimation that mr. Douglas was not the ſon of lady Jane.

'Tis needleſs to trouble your lordſhips with the conduct of the reſpondent's guardians at Paris, and elſewhere upon the Continent. Nothing has been diſcovered that could throw the leaſt blemiſh upon the honour of lady Jane Douglas or colonel Stewart: they have indeed proved her ſtraits there, and his impriſonment here; but both theſe circumſtances carry a further confirmation that the appellant is their ſon; for in every letter that paſſed between them the children are named with a tenderneſs ſcarce to be believed; whereas had they been counterfeits, as pretended, they would have been apt to upbraid one another for an act ſo manifeſtly tending to involve them in their ſufferings.

Suppose, my lords, that Mignon, the glaſs-manufacturer's wife, the pretended mother of mr. Douglas, had depoſed the ſame things in lady Jane's preſence as ſhe has ſo long after her death; from her evidence it appears ſhe had never ſeen lady Jane; by her words both in private and public ſhe ſeems to deſerve no manner of credit; the oath of mr. Murray, a principal witneſs, has deſtroyed every-thing ſhe has aſſerted. The ſame thing might be ſaid of Sanry the rope-dancer's ſpouſe, whoſe child's rupture we were earneſtly deſired to keep in view to prove him to have been the identical Sholto, the younger of the twins; and now evidence is offered that the child Sholto had no rupture, but was as ſound as any within theſe walls. Your lordſhips have been told, and I believe with great truth, that a gentleman, ſhocked at the aſſertion, had wrote to

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the counsel, that the influence arising from so false a suggestion might be prevented. I always rejoice to hear truth, which is the ornament of criticism, and the polished gem that decorates a bar.

THE scrutiny in France, followed by an action in Scotland, produced two things never intended by them; it brought forth a striking acknowledgment of the appellant by his father sir John Stewart, as is manifest from the bond of provision read at your lordships' bar *. Sir John openly acknowledged him before the court of session in the midst of a crouded multitude, and when labouring under a load of anguish and pain; nay, when by himself, he solemnly declared before God, in the presence of a justice of the peace and two clergymen, that the young gentleman was his son. It likewise established the character of lady Jane; for on examining the proof obtained through the vigilance of the duchess of Douglas, lady Jane's reputation is unsullied and great: all who had the honour of being known to her, declared, that her behaviour attracted universal esteem; and madam Marie Sophi Gillissen, a maiden lady, with whom she lodged several months, deposes that "lady Jane was very amiable, and gentle as an angel." It farther proved, that the elder child, the appellant, was the exact picture of his father, and the child Sholto as like lady Jane as ever child was like a mother.

* See page 48. of Letter I.

I HAVE always considered likeness as an argument of a child's being the son of a parent; and the rather, as the distinction between individuals in the human species is more discernible than in other animals: a man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men, every one may be known from another. If there should be a likeness of features there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness runs generally through all these, for in everything there is a resemblance, as of

features,

features, ſize, attitude, and action. And here it is a queſtion, Whether the appellant moſt reſembled his father ſir John, or the younger, Sholto, reſembled his mother lady Jane? Many witneſſes have been ſworn to mr. Douglas being of the ſame form and make of body as his father; he has been known to be the ſon of colonel Stewart by perſons who had never ſeen him before; and is ſo like his elder brother, the preſent ſir John Stewart, that, except by their age, it would be hard to diſtinguiſh the one from the other.

If ſir John Stewart, the moſt artleſs of mankind, was actor in the *enlevement* of Mignon and Sanry's children, he did in a few days what the acuteſt genius could not accompliſh for years. He found two children, the one the finiſhed model of himſelf, and the other the exact picture in miniature of lady Jane. It ſeems nature had implanted in the children what is not in the parents; for it appears in proof that in ſize, complexion, ſtature, attitude, colour of the hair and eyes, nay and in every other thing, Mignon and his wife, and Sanry and his ſpouſe, were *toto cœlo* different from and unlike to ſir John Stewart and lady Jane Douglas. Among eleven black rabbits, there will ſcarce be found one to produce a white one.

The reſpondent's cauſe has been well ſupported by the ingenuity of its managers; and great ſtreſs has been laid upon the not finding out the houſe where madam la Brun lived, and where the delivery was effected; but this is no way ſtriking, if we conſider that houſes are frequently pulled down to make way for ſtreets, and houſes are built upon the ground where ſtreets run before: of this there are daily examples in this metropolis. However, we need enter into no arguments of this kind, as there is a poſitive evidence before us; nor is it poſſible to credit the witneſſes, ſome of them of a ſacred character, when they ſpeak of lady Jane's virtues, provided we can

believe her to have been a woman of such abandoned principles as to make a mock of religion, a jest of the sacrament, a scoff of the most solemn oaths, and rush with a lie in her mouth and perjury in her right hand into the presence of the Judge of All, who at once sees the whole heart of man, and from whose all-discerning eye no secrecy can screen; before whom neither craft nor artifice can avail, nor yet the ingenuity and wit of lawyers can lessen or exculpate: on all which accounts I am for finding the appellant to be the son of lady Jane Douglas.

Die Lunæ 27° *Februarii*, 1769°.

COUNSEL being fully heard, and debate had in this Cause, it is ORDERED and adjudged, that the interlocutor complained of be REVERSED.

DISSENTIENT,

BECAUSE, upon the whole of the evidence, it appears to us, that the appellant hath not proved himself to be the son of lady Jane Douglas, and consequently not intitled to the character of heir tailzie and provision to Archibald duke of Douglas.

BECAUSE we are of opinion, that it is proved that the appellant is *not* the son of lady Jane Douglas.

SANDWICH,
BEDFORD,
BRISTOL, C. P. S.
DUNMORE,
MILTON.

No.

No. XV.

The SPEECH of LORD CHANCELLOR JEFFERIES on OCCASION of CREATING SIR EDWARD HERBERT LORD CHIEF JUSTICE OF THE KING'S BENCH *.

DIE VENERIS 23tio OCTOB. 1685.

THIS being the first day of the terme, sir Edward Herbert performed the usuall ceremonies at Westminster-hall, at the courts of chancery and common pleas, for being made a serjeant at law, and gave this motto in his rings:

Jacobus Vincat, Triumphat Lex.

AFTER which the lord chancellor came into the court of king's bench; and being seated in the chief justice's place, sent an officer of the court to call mr. serjeant Herbert, who was brought to the barr of the king's bench court, ledd by sir George Stroud and sir Thomas Stringer, two of his majesty's serjeants at law, and the lord chancellor made this speech to him:

MR. SERJEANT HERBERT,

I PRESUME it is not a surprise to any here if I tell you, sir, the king has sent for you to supply the vacancy

* Found among the MSS. of the late sir Joseph Jekyll, and communicated to the Editors by JOSEPH JEKYLL, Esq. barrister at law, of Lincoln's Inn, F. R. S. F. S. A.

See Roger North's Life of Lord Keeper Guilford; at the close of which there is a variety of anecdotes relative to the lord chancellor Jefferies's conduct towards persons of a party description; particularly those of the denomination of Trimmers, whom he so pointedly alludes to in the speech here given.

of the chief justiceship of this court; a place, perhaps, of as great concern and importance to the king and his people, as any other place in the nation. But though it be soe, yet I am to tell you, sir, his majesty thinks you fit for it (though I know you have other thoughts of yourselfe), and therefore this place (I must doe you that right) is conferred upon you without your own seeking.

But, sir, his majesty has kind, gratious, and just remembrances of the great services and sufferings of your father with that blessed martyr king Charles the First, and with gratious king Charles Second, of ever blessed memory. His majesty also has had experience of the services even in times of great danger, in storms both at sea and land, of some other of your relations who have hazarded their lives in the service of the crowne.

These things might justly create gratious intentions in his majesty's breast towards you; but, sir, I am to acquaint you, that it is not for that meritt which reflects on you from your relations that you are called to this honour and dignity; his majesty has had a great and long experience of your ability and fidelity both to him and his people in the discharge of an eminent place of judicature in this kingdome, as well as in another. He is very well satisfied of and pleased with your great courage and good conduct in that imploy, and for that reason hee hath now chosen you to serve him in this high and difficult station.

Sir, I can tell by my owne experience, it is a place of great labour and fatigue; but I blesse God, with those good assistances I had, I was able, in some measure, to cope with those difficultyes. And indeed I had very great assistances. I had assistance from the learned, ingenuous, and therefore loyall gentlemen of the barr, who tooke a great deale of care and pains to make the court understand what was for the benefit of their clients, and not to prate impertinently to please the audience; for if wee mett with

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any ſuch, they were ſure to meet with a rebuke; and therefore I cannot part with this ſeat where I have had the honour to ſitt, without giving them all hearty thanks for their aſſiſtance.

BESIDES this, I was aſſiſted by a learned, grave, and judicious bench, of whom there remains two learned gentlemen that ſitt on each hand of thee, who had long experience of the practice of the court, and withall of undaunted courage to performe their duty. And I cannot but remember that wee ſate together here in times as full of ſtormes and troubles as folly and madneſs, faction and rebellion could make them; yet, with God's bleſſing, wee were enabled to diſcharge the duty of our places ſoe faithfully, that our ſervices were accepted and gratiouſly approved of by the late king, and by our preſent ſoveraigne, whom, I pray, God long may continue to reign over us.

NOR muſt wee forgett that wee had the benefitt of an ingenious and induſtrious company of officers, who behaved themſelves in their ſeveral places with all diligence and integrity.

SIR, you will have all thoſe aſſiſtances; and beſides thoſe, you will have a great advantage in your own abilitys, which I am ſure will carry you much farther than thoſe that your predeceſſor could any way pretend to.

SIR, I have yet a farther encouragement for you: you have the promiſe of a gratious king; one knowne to all the world never to have broke, nay I may ſay (pardon the expreſſion) that durſt not breake his word; he has promiſed you his royal countenance and aſſiſtance: and if ſo, goe on, be proſperous! be undaunted and courageous! incourage all vertue and morality, ſuppreſſe all vice and iniquity; be ſure to execute the law to the utmoſt of its vengeance upon thoſe that are now knowne, and we have reaſon to remember them, by the name of WHIGGS! and you are likewiſe to remember the SNIVELLING TRIMMERS; for you know what our Saviour Jeſus Chriſt ſays in the Goſpell, that "they that are not for us are againſt us!"

SIR,

Sir, when I have ſayd this to you, pray give me leave to putt you in mind of one thing or two. I know you will be very indulgent, and kind, and affectionate to the gentlemen at the barr who ſtand round about you. As you will be well pleaſed with the aſſiſtance, ſoe you will liſten to the counſells of your bretheren upon the bench. You will have a care to give all fitting countenance to thoſe inferior magiſtrates who ſerve the king honeſtly and faithfully, and deſire to keepe his peace inviolate, though perhaps they have not arrived to that perfection of knowledge in the law which is the good fortune of a particular education in the profeſſion.

In ſhort, ſir, I doubt not but you will take care that the proceſſe of this court neither be injurious to the king nor oppreſſive to the ſubject; which they will not be if they be kept from being too numerous on the one hand nor too dilatory on the other.

In fine, ſir, as the ſumme of all your duty, Fear God and honour the King; but uſe your utmoſt authority for the ſuppreſſion of thoſe that are given to change.

I have now noe more to trouble you with, ſir, but am ready to adminiſter you your oath, and deliver you your writ *.

* The free and violent manner in which this ſingular character uſed to expreſs himſelf on the bench, of which the preſent ſpeech affords a ſtriking inſtance, is well known; and the averſion which he entertained particularly againſt the Trimmers is recorded in a remarkable anecdote in that entertaining and uſeful piece of biography before-mentioned, which is recommended as particularly intereſting to profeſſional readers, from whence we ſhall extract it. "One of theſe intemperances was fatal to him. There "was a ſcrivener of Wapping brought to hearing for relief againſt a bum- "mery bond. The contingency of loſing, all being ſhewed, the bill was "going to be diſmiſſed: but one of the plaintiff's counſel ſaid, that he was "a ſtrange fellow, and ſometimes went to church ſometimes to conven- "ticles, and none could tell what to make of him; and *it was thought he* "*was a Trimmer*. At that the chancellor fired. "*And a Trimmer!*" ſaid he: "*I have heard much of that monſter, but never ſaw one. Come forth, mr.* "*Trimmer*; turn you round, and let us ſee your ſhape!" and at that rate "talked ſo long, that the poor fellow was ready to drop under him; but "at laſt the bill was diſmiſſed with coſts, and he went his way. In the

hall

"hall one of his friends asked him how he came off. "*Came off!*" said he, "*I have escaped from the terors of that man's face, which I would scarce un- " dergo again to save my life; and I shall certainly have the frighful im- " pression of it as long as I live.*" Afterwards, when the Prince of Orange " came, and all was in confusion, this lord chancellor, being very ob- " noxious, disguised himself in order to go beyond-sea. He was in a sea- " man's garb, and drinking a pot in a cellar. This scrivener came into " the cellar after some of his clients, and his eye caught that face, which " made him start; and the chancellor, seeing himself eyed, feigned a cough, " and turned the other way with his pot in his hand. But mr. *Trimmer* " went out and gave notice that he was there; whereupon the mob " flowed in, and he was in extreme hazard of his life; but the lord mayor " saved him and lost himself. For the chancellor being hurried with such " croud and noise before him, and appearing so dismally, not only disguised " but disordered, and there having been an amity between them, as also " a veneration on the lord mayor's part, he * had not spirits to sustain the " shock, but fell down in a swoon; and, in not many hours after, died." North's Life of Lord Keeper Guilford, page 220.

* Sir John Shorter.

No. XVI.

On the INTEREST *of the* HUSBAND *in the* REAL *and* PERSONAL ESTATES *and* CHATTELS REAL *and* PERSONAL *of the* WIFE.

A MAN marries a woman that hath an eſtate of inheritance and an eſtate for life, and a leaſe for years, or other chattels real; alſo debts owing to her, and goods or chattels perſonal.

THE queſtion is, What doth the law give to the huſband by the intermarriage, without any other gift to him from his wife?

THE anſwer muſt be ſeveral, to wit, 1ſt, If the woman at the time of the marriage hath an eſtate in fee-ſimple, or an eſtate tail (which are the eſtates of inheritance) in any lands, tenements, rents, or other hereditaments, the huſband is immediately ſeiſed of the freehold, not in his own right but *jure uxoris*, and he ſhall have the profits thereof during their joint lives; and if he hath a child by her born alive (although it die), yet, after the wife's death, the huſband ſhall hold the ſaid land, or other hereditaments, during his own life, as tenant by the courteſy. But if the huſband die before the wife, ſhe ſhall have her own inheritance again, immediately after his death, to her and her heirs. And if the wife die before the huſband, and there hath been no child born alive, then the heirs of the wife (whether it be her brother, ſiſter, uncle, aunt, or other couſin of her blood) ſhall, immediately after her death, have the land from the huſband. And if the wife die before the huſband, and there hath been a child born alive, then, after the huſband's death, (viz.) when his eſtate by the courteſy

courtesy ends, the heir of the wife shall have the land. The husband and wife at any time by a fine may sell or give away this land as they both please; and the husband alone, without his wife, may grant or charge the land during the joint lives of him and his wife; and if he hath a child by her, then during his own life. But the husband alone, as the law stands at this day, cannot make any alienation or discontinuance that shall hinder the wife or her heirs, after his decease, from having the land or hereditaments; and if he commit treason or felony, her estate shall not be forfeited, but only the profits during the coverture; but for her own treason or felony it will be forfeited for ever. See 32. H. 8. c. 28.

SECONDLY, If the woman at the time of the marriage hath an estate of frank tenement, that is, if she hath an estate for her own life, or for the life of another person, or an estate in dower (which she may have from a former husband), immediately upon the intermarriage her husband is seised of the freehold of such an estate in the right of his wife, and shall have the profits thereof during the intermarriage; but if he dies, the estate for her own life will be quite at an end, and her husband cannot be tenant by the courtesy in this case. But if she had an estate for the life of another person that survives her, then the husband may be the special occupant, and have the land during the life of that other person only. And after those estates for lives are ended, the land goes to those that have the next in reversion or remainder, which generally are strangers. The husband and wife, by a fine, may sell and dispose of any such estate for life, or the husband alone may dispose of the land during the coverture between them; but it being an estate of freehold, no single act of his own can alien this estate for life so, but that the wife surviving the husband will have it again as she had before the marriage. See 1. Wil. 469.

THIRDLY,

THIRDLY, If the woman at the time of the marriage hath a chattel real, *(i. e.)* a leafe for years, or an eftate in land, actually extended upon a Statute Merchant, Statute Staple, Recognizance, or Elegit, to be holden till a debt is fatisfied to her, then the hufband, immediately upon the intermarriage, is poffeffed of fuch leafe or other chattel real in right of his wife; and as to thefe, the law gives him power (without her) to fell, affign, furrender, or otherwife difpofe the fame as he pleafes by any deed or act executed in his life-time, but not by his will or teftament; and if he commits felony or treafon, he forfeits the fame, and the fheriff may fell fuch term or intereft, upon an execution, for the hufband's debts. But if the hufband does not fell, furrender, or otherwife as aforefaid difpofe of or forfeit the fame in his life-time, then the wife, after his death, will have fuch leafe, eftate, or intereft again in her own right, without being executrix or adminiftratrix to her hufband. And if he fhall have granted a rent-charge out of the fame (without altering the eftate of the land, as he might have done), the rent-charge will be void after his death; but if he furvives his wife, the law gives him her chattel real intirely.

FOURTHLY, If the woman at the time of her marriage hath debts owing to her by Statute Merchant, Statute Staple, or Recognizance not executed, or upon bonds, bills, notes, or other fpecialties, thofe and the like are called *chofes en action*, becaufe they do not lie in feifin or in poffeffion, but fhe had a title to recover the fame by an action at law. The hufband, at any time during the coverture, hath power to fue for thefe debts, and to recover, and then to have the fame to his own ufe, or to releafe or difcharge the fame as he pleafes; or the hufband, at any time during the coverture, may change the fecurities (if the debtor will confent thereunto), by cancelling the fame,

and

and taking new ſecurity for the debt in his own name, and to his own uſe: but if he dies before he recovers the money, or alters the ſecurity, ſo that the nature and property of the debt is not altered, then the wife will be intitled thereunto in her own right, without adminiſtering to him or being liable to his debt, and yet he may have other executors or adminiſtrators of his own perſonal eſtate.

FIFTHLY, All the goods and chattels perſonal which the woman hath at the time of her marriage, are by law intirely given to the huſband; namely, all ready money, plate, jewels, houſehold goods, horſes, cows, and other cattle, wares, merchandizes, and all moveables in general, ſo that he may not only ſell or give the ſame as he pleaſes, but upon his death the ſame will go to his executors or adminiſtrators, and ſhe cannot have the ſame unleſs by gift from him, or by being his executrix or adminiſtratrix.

NOTE. If a woman have a right to any chattels, and be ouſted and diſpoſſeſſed thereof, and then takes a huſband who ſurvives the wife, not having recovered the ſaid right in her life-time, then the executor or adminiſtrator of the wife, and not the huſband, ſhall have ſuch a kind of right; but the huſband may adminiſter to his wife if he pleaſes.

NOTE alſo, That if a woman be executrix or adminiſtratrix to another perſon deceaſed, which might be a firſt huſband, then ſhe is ſaid to be poſſeſſed of the eſtate *en auter droit*, (*i. e.*) in right of the teſtator or inteſtate, and the law doth not give any ſuch eſtate to the huſband that ſhe ſhall afterwards marry; for the goods, chattels, and debts, in this caſe, never were her own, but intruſted to her upon account; and it is an uſual thing that a woman intending to marry who hath a valuable leaſe, will, before marriage, aſſign the ſame to truſtees for her

own

See 1. Eq. Ca. Abr. 58. Such assignment must be made with husband's consent and privity, 2. Vern. 78.

own benefit, so that her husband shall not intermeddle therewith, and the trust of this lease (as is said) will not go to the husband; but it seems fair to give him notice of such assignment, or else he should not be concluded in equity.

In the Case of Pitt *v.* Hern, the then lord chancellor seemed to be of opinion, that the husband should be made a party to such assignment in order to be barred.

No.

No. XVII.

An ANALYSIS *of the* THEORY *and* PRACTICE *of* CONVEYANCING *.

THE common conveyances of this kingdom are of two sorts, and made two manner of ways, *viz.* by matter of record or by deed.

BY matter of record two conveyances are made, viz. a fine and a common recovery.

BY matter of deed are eight conveyances.

1. FEOFFMENT. 2. Grant. 3. Bargain and sale by deed indented or inrolled. 4. Lease. 5. Exchange. 6. Surrender. 7. Release or Confirmations. 8. Devise, or Will and Testament. 9. Covenant to stand seised.

THE NATURE OF A FINE.

THE word fine is ambiguous, but is here taken for a final agreement or conveyance upon record for the settling and securing lands and tenements. FINE.

IN every fine a suit is supposed, wherein the party who is to have the thing is called the plaintiff, and sometimes the conusee; and he who parts with the thing is called the conusor, and sometimes the defendant.

IT is called *finalis concordia*, because it puts an end to the suit, the parties thereby becoming agreed.

A FINE is thus fully described: It is an instrument of record of an agreement concerning lands, tenements, or hereditaments duly made by the king's licence, and ac-

* The present Tract, which comprehends a view of the whole law of Conveyancing, follows the method and arrangement of that excellent treatise on the subject entitled, "Touchstone of Common Assurances," and may be considered as a compendious abridgment of that approved work.

knowledged by the parties to be the ſame upon a writ of covenant, writ of right, or ſuch like thing, before the juſtices *C. B.* or others thereto authoriſed, and engroſſed of record in the ſame court, to end all controverſies thereof between themſelves who are parties and privies thereto, and all ſtrangers not claiming in due time.

THERE are five eſſential parts of a fine:

1. THE original writ taken out againſt the conuſor.

2. THE king's licence of levying a fine, for which the king is to have a fine called the king's ſilver.

3. THE conuſance, or concord itſelf, which is the very agreement between the parties who intend to levy the fine, how and in what manner the thing ſhall paſs; and it begins, "*Et eſt concordia.*" This is the foundation and ſubſtance of the fine.

4. THE note of a fine is, that it is an abſtract of the original contract or concord, and begins, "*Int. A. querentem & B. & C. deforcientes.*"

5. THE foot of the fine, which begins, "*Hic eſt finalis concordia,*" &c. and contains all the matter, day, year, and place, and before what juſtice it was levied: it is called the foot becauſe it is the laſt part of it, and the indentures are made by the chirographer, and given to the party to whom the conveyance is made; and this is called the fine.

THE DIVISION OF FINES.

FINES are of two ſorts; without a proclamation, or with: the former is called a fine at common law, and the latter is made according to the ſtatute, becauſe the form and manner of it is ordained by ſtatute 4. *H.* 7. c. 24.

THE manner and order of levying a fine is thus:

AN original writ is iſſued out—This may be any writ of right whereby land is demanded or may be recovered, but a writ of covenant is moſt uſual. It muſt bear *teſte* before the *dedimus poteſtatem*, elſe the fine is erroneous.

AFTER

AFTER this there is the *præcipe*, which is the title of the writ whereon the fine is levied, and the concord and agreement of the parties; both which are to be fairly wrote, most commonly in parchment.

THEN the parties who are to acknowledge and levy the fine are to come in person before him or them that have power to take the conusance, who are to take notice of the persons.

THEN all the parties who are to levy the fine are to declare themselves before the judges or commissioners to be willing to pass their right that they have in the land according to the agreement, and to subscribe their names or marks to the concord.

AND if it be taken by a special *dedimus potestatem*, it must be returned and certified under the hands and seals of the commissioners into the court of common bench, that it may be there recorded and finished.

THEN the conusee is to compound with the king for his licence, for which he is to pay the king's silver, which is to be entered on the back of the writ of covenant, and then enrolled by the *custos brevium*; and on this roll the proclamations are to be indorsed.

THEN it is to be brought to the chirographer, who is to make the note of it. Hereupon, if it be a remainder, reversion, rent, &c. whereof the fine is levied, the writ of *quid juris clamat quem redditum reddit*, &c. must be sued forth.

THEN the chirographer is to enter the fine of record, to engross it, and to make and deliver the indentures to the conusee; and if it be a fine with proclamation, it is to be proclaimed openly in the court of common bench every four terms after the engrossing it.

AND the next term after the engrossing it the contents are to be recorded in a table made for that purpose, to be set up in the court of common bench at Westminster in

an open place all the term; and ſo alſo at every aſſizes the fine may be inrolled and exemplified.

THE POWERS AND USE OF A FINE.

THE fine is of great antiquity for credit and eſteem, and is now become a formal conveyance; and is of that force, that it paſſeth all the right and intereſt of the conuſor to the conuſee, and works by way of extinguiſhment or eſtoppel, and for ever, bars the conuſor and his heirs of all preſent and future right to the thing whereof the fine is levied; and if it be with proclamation, it in time becomes a perpetual bar to all perſons alſo that have right, except they prevent the bar by their claim, action, or entry, within five years after the proclamation is ended; and it bars entails peremptorily, whether they do claim within five years or not.

ANY perſon able to grant may levy a fine and be conuſor; and any one that may be a grantee in a deed may be a conuſee in a fine.

THE conuſor and conuſee's names muſt be certainly ſet down; and if there be two of a name, it is convenient to make ſome diſtinction, as ſenior or junior, &c.

THE judges for recording fines are the juſtices of common bench.

A FINE may be levied of all things whereof a *præcipe quod reddat* lies. Things that paſs by a fine muſt be named to lie in the ſhire, town, pariſh, or hamlet where it doth lie.

THE more worthy things muſt be ſet down before the leſs worthy—as a manor before a meſſuage, a caſtle before a manor; then a houſe, arable land, meadow, paſture: general and entire things before ſpecial, and parts of things and particular things after this manner: *Meſſuagium, toftum, molendinum, columbare, gardinum, terra, pratum, paſtura, boſcus, bruera, mora, juncaria, mariſcus, alnetum, ruſcaria, redditus.*

BUT

But if a tenant for life levy a fine of his land to a ſtranger to hold to the conuſee for a longer term than for the life of tenant for life, though the fine be good, yet it is a forfeiture of the eſtate.

No ſole member of a corporation, aggregate of many, can levy a fine of the lands of the corporation, but they may levy fines of the land they hold in their own right.

Such as have eſtates of freehold in eccleſiaſtical lands in right of the church, as biſhops, deans, prebends, and parſons, may not levy a fine of ſuch land; for if they do it will not bind the ſucceſſor.

He who hath lands in fee-ſimple in right of his wife, ought not to levy a fine without her; and if he do, ſhe and her heirs may avoid it after his death.

In the concord of a fine, theſe things following are to be obſerved (to wit):

1. When a fine is levied to divers conuſees, the right ſhall be limited to one of them.

2. The eſtate ſhall be limited to the heirs only to whom the right is limited, and not to the heirs of all the conuſees.

3. The releaſe and warranty muſt be from the heirs of one conuſor, if there be many; for in a fine from divers, the fee is ſuppoſed to be in one only.

4. The concord needs not to rehearſe all the ſpecial names of the things mentioned in the writ, it is enough to ſay *tenementa prædicta*, *&c.*

5. The concord muſt purſue the original writ, and cannot be of any thing not contained in the writ.

A fine levied by covin by tenant for years, or life, or a copyholder, with intent to bar the reverſion or lord of the inheritance is of no force, and non-claim within five years in this caſe will not hurt. A fine without proclamation bars none but parties or privies thereto, but a fine with proclamation is now much of the ſame virtue as that at common law was, and concludes all par-

 ties,

ties, privies, and ſtrangers, except femes covert, infants, perſons impriſoned, out of the realm, and *non-ſane* memory, ſo as they or their heirs bring their actions or enter within five years after theſe impediments removed.

For the better underſtanding of this, obſerve, that the parties barred by a fine are,

I. Parties. II. Privies. III. Strangers.

I. Parties (of the age of twenty-one years) are barred for ever by a fine, and they have no time to preſerve their right.

II. Privies being heirs and executors to the parties, and void of impediment at the time of the fine levied, are barred for ever by fine, and have no time to claim and preſerve their right.

III. Strangers are ſuch,

1. As have a preſent right and no impediment; and theſe are barred if they make not their claim in five years after the proclamations.

2. Such as have a preſent right but have an impediment; and they have five years to claim after the impediment removed.

3. Such as have neither a preſent nor future right at the time of levying the fine, by reaſon of any matter before the fine, but whoſe title groweth either entirely after, or partly before and partly after the fine, are not barred at all by the fine, but may claim when they will.

Though a fine with proclamation is a continual bar to any heir in tail, though under age when the fine was levied, yet it is no bar to the remainder-man, or reverſion, when the eſtate tail is ſpent.

If the huſband levy a fine of the wife's land, that is no bar to her when he is dead; but ſhe is barred for ever unleſs ſhe claim within five years after his deceaſe.

If diſſeiſor levy a fine of diſſeiſee's land, if diſſeiſee do not claim within five years, he is for ever barred; but if another

another levy a fine of land which I am possessed of, this does not hurt me, for a fine cannot be levied of any land but that which the conusor hath in possession.

WHERE there is a precedent agreement of the parties, as a feoffment, the fine shall not pass any thing, but work only by way of corroboration, and this is called a fine executed; but if there be no such agreement, then it is a fine executory, and is as good as actual seisin.

A FINE may be avoided,

1st, BY death of the parties after conusance before recording it.

2d, BY covin in the procuring it.

3d, BY error in the proceeding and issuing out of the fine, and this is done by writ of error; but the error to make the fine voidable must be notorious, because the thing is done by consent, *et consensus*, &c.

4th, BY action, claim, or entry of a stranger that hath right, if he doth it by authority from and with the consent of him who hath right.

5th, BY plea; as,

(1.) BY averment of continuance of seisin of land in another at or before the time of the fine levied.

(2.) BY averment that *partes finis nihil habuit tempore levationis finis*, and then he must shew in whom the estate was.

(3.) BY the sentence of a court, when it appeareth that it is gotten or obtained by some notorious fraud.

THE NATURE OF A COMMON RECOVERY.

A RECOVERY, in general, is obtaining any thing unjustly taken, or detained by judgment or trial at law; but the common recovery here meant, being the assurance of land, is a certain form and course set down to be observed for the better assuring of lands: it is somewhat like a recovery upon title; but this is with the will and COMMON RECOVERY.

 consent

consent of the person against whom the recovery is had, and that is against it; for in this colourable suit there is a demandant, who is called a recoveror, the vouchee called the recoveree, and one who is called to warrant upon a supposed warranty, who is called the vouchee.

THE common recovery is sometimes with a single, sometimes with a double voucher: the first, when the writ is brought against him who is to pass the land immediately, and he vouches over the common vouchee; the second is, where the writ is brought against another to whom he who passeth the land hath aliened it, and he vouches him who is to make the assurance, and he vouches over the common vouchee, this last is the safest and surest kind of recovery.

THE form of proceeding in this case is thus: by agreement of parties a real action is begun by writ of entry brought by him who is to have the land assured against him who is to make the assurance, if it be with a single voucher; and if with a double voucher, against him to whom he that is to make the assurance hath aliened; and in this suit the recoveror who brings the action surmiseth, that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereto, and that the tenant came to it from such a stranger whom the demandant doth name the tenant.

AND to this the tenant doth appear in person, or by attorney, and then doth enter in defence of the land; but in pleading doth vouch to warrant a stranger of whom he bought the land, and by the conveyance thereof bound him and his heirs to warrant and make good the title to him, and thereon prays that the stranger may be brought in to defend the title, and then he is allowed by the court to call him in to say what he can for the justifying of his title to his land before he so conveyed it. And hereupon a stranger appears, and makes shew as if he would defend the title, but prays that a further day may be appointed by

by the court to make his defence; which being granted, at the day appointed he, by agreement and covin of parties, doth not come in, but makes default, and thereon the land is to be recovered by him who brought the writ against the tenant, and he is left for his remedy to the ſtranger upon his warranty; and accordingly judgment is given by the court that the demandant ſhall recover the lands demanded againſt the tenant, and that the tenant ſhall recover ſo much land of the ſtranger in recompence of the land recovered from him, which he ought to have warranted and defended; and this recovery over is called a recovery in value.

But if the recovery be with a double or treble voucher, the ſtranger is, on his appearance, to call to warrant *T. D.* and alledge it in the ſame manner that the tenant doth, and ſo pray that he may come in; and thereon *T. D.* appears and makes default; and ſo if there are more vouchers.

But the vouchee is always the common vouchee, who is one of the criers, *C. B.* worth nothing, and that hath no land to render in value on the ſuppoſed warranty.

Thus the land is aſſured to the purchaſer, the recoveree of conſent letting the land go and recovering nothing in value; and hereby are lands in tail commonly ſold and converted into a fee-ſimple. A recovery, being matter of record, is much of the nature of a fine, and is a thing whereof the law takes notice, it being now become one of the conveyances of the kingdom, and hath a ſpecial virtue and uſe to bind eſtates tail.

THE REQUISITES TO A GOOD RECOVERY.

1ſt. That there be a demandant, tenant, vouchee, as the efficient cauſes thereof.

2d. Land demanded as the matter, and that the thing be demandable.

Note,

NOTE, That a writ of entry for suffering a recovery may be had of those things for which a writ of covenant may be had for levying a fine.

3d. THAT it be had and suffered in that form and order that the law requires, and is before laid down.

4th. A LAWFUL tenant to the *præcipe* is, that the writ of entry be brought against him who is tenant of the freehold by right or wrong.

5th. THAT it be in such a case as is not prohibited by any statute; for if the king gives land in fee-simple or tail, or remainder to the crown in fee or tail, the recovery suffered by such a tenant is void.

HOW A RECOVERY MAY BE DEFEATED, FRUSTRATED, OR AVOIDED, FOR MANY CAUSES; AND THAT IS CALLED SATISFYING A RECOVERY.

1st. FOR that there is some gross error in the manner of the proceeding.

2d. FOR that he against whom the recovery was brought was not tenant of the freehold.

3d. THAT the recovery be had by covin.

NATURE OF A DEED.

DEED. A DEED is an instrument on paper or parchment, written, sealed, and delivered, to prove and satisfy the agreement of the parties whose deed it is to the things contained in the deed.

DEEDS are, indented, or poll. The deed indented, which is an indenture, is when the paper or parchment is cut and indented: it is a writing containing a conveyance, bargain, contract, covenant, or matter of agreement betwixt two or more, and is indented on the top or side, answerable to another that doth comprehend the self-same matter.

THE deed poll is plain, without any indenting where the paper or parchment are cut even, and this is single and,

but

but one, which usually the feoffee, lessee, or grantee hath; but the deed indented is *bipartite*, *tripartite* or *quadrupartite*.

And then each party hath a part of the indenture, and, according to their parts, they do interchangeably seal to one another; but the part sealed by the feoffor, lessor, or grantor, is said to be principal or original, the rest counterparts or copies; yet all make in law but one entire deed.

An indenture made in the first or third person is good enough; the deed poll is generally made in the first person, but the third person will do.

Of deeds, some are absolute, some conditional, some inrolled, and some not; some concern the realty, some the personalty, and some are mixed. Some of these contain matter of grant or gift, as feoffments, gifts, bargains and sales; grants and leases are the chief. Some contain matter of discharge, as releases, acquittances, defeasances, &c.: some contain other matter, as confirmations, &c. Others distinguish themselves thus: some are constitutive, some remissory or liberatory of the former: some are creating, whereby an estate or obligation that had no existence before is newly raised; as the first grant of a rent, common way, estate tail, for life, or years, &c.: some are conveying; by which estates, property, or the like, being already created or conveyed to others, as feoffments, bargains and sales, grants over, or assignments and surrenders: and seeing those that are of the last sort do describe and testify some precedent contract, or duty so paid, performed, or done, released or discharged; of which sort are all acquittances, releases, and such like matters of discharge; every agreement put in writing, and sealed and delivered, becomes a deed. "It is agreed "that the grey mare, &c. In witness whereof we "have set our hands and seals. Note, the parties were "not otherwise named in the deed."

Adjudged,

ADJUDGED, that an action would lie by the bare ſigning and ſealing. 1. Salk. 214.

IN every deed there are two parts conſiderable.

1ſt. THE external or material parts are the parchment, wax, and writing.

2d. THE internal intellectual parts are the ſenſe, force, virtue, and operation of the words and matter therein contained.

IN the writing of divers deeds, as feoffments, grants, leaſes, &c. there are certain formal parts which make up the whole of which the law takes notice eſpecially; as,

1ſt. THE premiſes; the office whereof is rightly to ſet down the name of the feoffor, grantor, leſſor, &c. and to comprehend the certainty of the things granted or ſet.

PARTIES not named in the deed, otherwiſe than by ſigning, adjudged good. 1. Salk. 214.

T. the defendant do promiſe and engage to bring in the body of *H.* to the cuſtody of *B.* &c. and the plaintiff not named in the deed, which is a deed poll, yet the party muſt be named in it. 1. Salk. 197.

2d. THE *habendum*; the office whereof is to name again the feoffee, leſſee, &c. and to ſet forth what eſtate he ſhall have, and for what time he ſhall hold the ſame.

3d. THERE is ſet down upon what terms or conditions the eſtate of the thing granted ſhall be to be held; therefore a *tenendum* is ſometimes inſerted to ſet forth by what tenure the grantee ſhall hold the land granted; ſometimes a reſervation, to ſhew by what rent he ſhall hold the land; ſometimes a condition.

4th. WARRANTY.

5th. COVENANTS.

6th. THE concluſion after the manner of *cujus rei teſtimonium*, wherein is ſet forth the date of the deed, containing the day, month, and year, and the ſtile of the king, and the year of our Lord.

TO

To the making a deed containing any agreement, it is therein requisite,

1st. That it be written on parchment or paper, and that the agreement be legal and formally set down, and be sufficient in law for the composition and frame of words.

2d. That there be a person able to contract and be contracted with, and a thing to be contracted for; and that all these be set down by sufficient names.

3d. Reading: (i. e.) That if it be an illiterate man who is to seal the deed, and he desires to have it read, that it be truly read.

4th. Sealing. That a deed be sealed by the party for a further testimony of his consent thereto.

5th. That the deed so writ and sealed be delivered by the party, or some other by his appointment as his deed.

6th. That the ground and foundation of making the deed be good, and not against law.

But in some cases, to perfect the contract and make the conveyance of the thing intended thereby good, some ceremonies are requisite, as inrollment, livery of seisin; attornment, &c.

A deed may be avoided on several accounts:

1st. When made with an intent to deceive and defraud one that shall afterwards buy the same thing.

2d. When made with an intent to deceive creditors of their just debts.

3d. When made to defeat the king or other lords of their wardships.

A deed good in creation may become void *ex post facto:*

1st. By razure, interlining, or addition of things either added or blotted out of essential moment.

2d. If after the deed perfected or delivered the seal happen to be broken off or utterly defeated.

3d. If a deed be delivered up to a person bound by it, to be cancelled, and it be so.

4th. A

4th. A GOOD deed may be avoided by sentence or order of a court, when it appears that it was done by fraud, force, circumvention, or such like practice; and this is called the vacating of the deed. All deeds take effect and work from the time of their delivery; and this is presumed to be the time of their date, if the contrary do not appear.

A DEED may also be avoided, sometimes by plea; as a man may plead *non est factum*; either when the deed wants writing, or signing, or delivery, as is before set forth, or if altered by rasure or the like.

As the claim of a deed, whereby the feoffor, donor, or grantor, &c. doth except somewhat out of that which he before granted by the deed.

IN every good exception these things must always concur:

1. IT must be by apt words.

2. IT must be of part of the thing granted.

3. IT must be only of part of the thing, and not of all; or if I grant to one all my lands in Black Acre and White Acre, excepting those in White Acre.

4. IT must be such a thing as is severable from the thing granted.

5. IT must be of such a thing as he that doth except may have, and doth properly belong to him.

6. IT must be a particular thing out of a general.

7. IT must be certainly set down and described.

A RESERVATION is a claim of a deed whereby the feoffor, &c. doth reserve somewhat new out of that which he had before granted; but this differs from an exception, in that the thing excepted was in use before, but the thing reserved is newly created by this reservation.

THESE things are requisite to a good reservation:

1. IT must be by apt words.

2. OF some things issuing or coming out of the thing granted, and not part of the thing itself, or of something issuing or coming out of another thing.

3. OF

3. Of a thing where the grantor may have resort to distrain.

4. It must be made to one of the grantors, and not a stranger to the deed.

As for the construction of deeds, it must be considered, Construction of Deeds.

I. How a deed in the gross shall be taken and enured?

II. How it shall be taken and expounded in the several parts?

As to the first, observe these rules.

1st. If divers join in a lease or deed, and some are able to join in a deed and some are not, this shall be said to be his deed alone that is able.

2d. Deeds indented and made to one purpose may enure to another.

3. When a deed may enure to divers purposes, he to whom it is made may have the election which way to take it, and may take it that way which will be most for his advantage.

4th. It shall enure, as much as may be, according to the apparent interest of the parties.

5th. If one have divers estates in lands, and he make any charge or grant upon or out of it, this shall issue out of all his estates.

For the construction of the several parts, there are some rules in general:

1st. That the construction be as near the minds of the parties as possible, and favourably so.

2d. That it be reasonable, and according to indifferent and reasonable understandings.

3d. Too much regard is not to be had to the nature and proper distinction, signification, and acceptance of words and sentences, to prevent the simple intentions of the parties.

4th. That one part of the deed be construed and help to expound the other, and that the parts are presumed to agree one with the other.

5th. That

5th. That the conſtruction be ſuch, as the whole deed and every part of it may take effect to the purpoſe, as much as may, for which it was made.

6th. All the words in the deed are to be taken moſt ſtrongly againſt him that ſpeaks them, and in moſt advantage to the other party.

7th. If there be two clauſes in a deed repugnant one to another, the latter ſhall be rejected; but on the contrary in wills.

8th. That which is generally ſpoken be generally underſtood, unleſs it be qualified by ſome ſpecial ſubſequent words.

9th. That if words admit of a double intendment, and the one is with law and the other againſt it, it is to be taken in that ſenſe which is law.

10th. That things doubtfully ſet down be applied to him to whom they are properly belonging.

11th. That ſuch conſtructions be made of abbreviations as the deed may not loſe its force.

As to the ſeveral particulars of a deed, obſerve theſe rules touching the things granted:

1ſt. That when any thing is granted, all the means to obtain it, and all the fruits and effects of it, are granted; as by the grant of ground the way to it is granted.

2d. The incident, acceſſary, appendant, and regardant ſhall, in moſt caſes, paſs by the grant of the principal.

3d. That which is parcel of the eſſence of a thing, although at the time of the grant it be actually ſevered from it, doth paſs by the grant of the thing itſelf; ſo by the grant of a mill the mill-ſtones paſs.

4th. By the grant of the land or ground, all that are *ſupra*, as houſes, trees, &c. are granted.

5th. When any matter of intereſt or profit is granted, it ſhall be taken largely; but when a matter of eaſe or pleaſure, as a walk, &c. it ſhall be taken ſtrictly.

6th. When

6th. WHEN a man grants all his lands or goods, not only what he is solely possessed of, but what he is jointly seised of.

II. As to the words and terms whereby things pass, observe,

1st. SOME words are collective and compound, comprehending many things; as hereditaments, lands, tenements, honours, villages, &c.

2. SOME words are simple and particular; as meadows, pastures, wood, moor, &c.: and note, that these words in a grant do pass all things they comprehend and signify.

THERE are three things more in a deed to be observed:

CONDITION,

COVENANT,

WARRANTY.

A CONDITION is a kind of bridle annexed to one's act, staying and suspending the same, and making it uncertain whether it shall take effect, and whereby an estate may be either defeated, created, or enlarged, on an uncertain event; and differs from a limitation, which is the bounds and compass of an estate, or the time how long an estate shall continue. Condition in a deed may be annexed to things inheritable, to freeholds, or chattels real or personal. CONDITION.

BUT a condition cannot be reserved to a stranger, but only to him that makes the estate. The words in a deed that denote the condition, are generally *proviso*, *ita quòd*, *sub conditione*.

A COVENANT is an agreement of two or more by deed in writing, sealed and delivered, whereby one of the parties doth promise to the other that something shall be done. COVENANT.

ANY one party to the deed to whom the covenant is made may take advantage of the covenant, but not a stranger.

WARRANTY.

A WARRANTY is a covenant real annexed to lands and tenements, whereby a man and his heirs are bound to warrant the same.

THE fruit and effect of a warranty is, that it bars the warrantor for ever, so that his present or future rights which he may have therein are become extinct.

THE words *dedi & concessi* only in a feoffment, do make a warranty when an estate of freehold or inheritance do pass by the deed; but the word *warrantizo*, or warrant, is the only apt and express word to make an effectual warranty in fines.

NOW we come to the particular assurances by matter of deed; which are, first,

FEOFFMENT.

A FEOFFMENT, which is the *donatio feodi*, or strictly or properly a gift or grant of any manors, lands, tenements, or other corporal immoveable things of the like nature, which be heritable to another in fee simple by livery of seisin and possession of the thing given.

THE most antient forms of these deeds are very brief, but had these parts:

1. PREMISES.
2. HABENDUM.
3. TENENDUM.
4. REDDENDUM.
5. THE cause of warranty.
6. CUJUS *rei testimonium*.
7. THE date.
8. THE clause of *Hiis testibus*.

THIS conveyance is the most antient and excellent, and in some respects preferable to fine and recovery; for it cleareth all abatement, disseisins, and intrusions, or other wrongful and defeasible titles.

REQUISITES to a good feoffment are,

1st. THAT it be written, sealed, and delivered, as all other deeds must be.

2d. THE feoffor must be a person able to grant.

3d. THE

3d. THE feoffee must be able to receive.

4th. THE thing must be grantable; and

5th. GRANTED in the manner which the law requires.

WHOEVER is disabled by the common law to take, is disabled to make a feoffment, gift, grant, &c. and many that have the capacity to take, are not enabled to grant.

A FEOFFMENT may be made this day of any thing that lies in livery and seisin, by whatever tenure it be held.

LIVERY of seisin is a solemnity or overt ceremony required by law, and used for the passing of lands or tenements corporeal, as a testimony of the willingness of the parties to give and accept the thing granted; the design of it being, that the country might take notice how lands pass from man to man, and who hath the title thereto, and from whom to take leases, &c. and by this the jury might have less trouble to find out who has the right.

LIVERY in deed is, when the feoffor, donor, &c. doth by himself, or another by his appointment, take the ring or key of the door, or twig or turf of the land, and deliver it to the feoffee, donee, &c. in the name of seisin of the house or land.

LIVERY in law is, when the feoffor, being in view of the land or house, saith to the feoffee, "I give you yonder "house or land, to you and your heirs. Go, take possession "of it accordingly."

LIVERY of seisin is needful when an estate in fee-simple, in tail for life (or years, with a remainder) doth pass.

As for the making of the livery,

1st. IT must be done in the life-time of the feoffor or donor, and of the feoffee, donee, &c.

2d. IF it be a lease for years, with remainder over in fee, livery must be made to the lessee for years before his entry, or at the time when he doth enter; for it cannot be made after.

3d. It muſt not be made before the eſtate commences, for then that livery is void. Livery of ſeiſin may be made of any corporeal thing; as manors, lands, meadows, paſtures, woods, chambers, or the like.

To every livery of ſeiſin there is needful ſuch an act as the law doth adjudge to be a livery, or apt words that do amount unto it.

OF A GRANT.

Grant. This word largely taken is, when any thing is granted or paſſed from one to another; and in this ſenſe it is very extenſive, comprehending feoffments, bargains and ſales, gifts, grants, leaſes, and the like; but is more ſtrictly and properly taken as a conveyance or gift by writing of ſuch an incorporeal thing as lies not in livery, and cannot be given by word only without deed; or it is the grant of ſuch perſons as cannot paſs any thing from them but by deed, as the king, bodies corporate, *& ſimilia.*

The things that paſs by grant are ſuch of which no livery doth lie, and are of this ſort, viz. rents, reverſions, ſervices, advowſons in groſs, *& ſimilia*, which things cannot paſs from man to man without deed.

It is requiſite in every good grant,

1ſt. That there be a grantor capacitated duly for it.

2d. A donee able to receive.

3d. A thing granted, and that it be grantable.

4th. That it be granted in the order and manner that the law requires.

5. That there be an agreement to, or acceptance of the thing granted by the grantee.

All bodies corporate or aggregate of many cannot grant lands, goods, or chattels, but by deed.

Dedi & *conceſſi* are the moſt proper words for all kinds of grants; but it may be by other words, and the grant be good.

Who-

Whoever may be a feoffor may be a grantor; and any natural, politic, or corporate body may be a grantor, not prohibited by law; as *feme coverts*, infants, and fuch like: and all perfons who may be grantors may be grantees: and fome alfo who cannot grant or give, may take or receive; as an infant, *feme covert*, perfons attainted of treafon, may be grantees.

A grant may be void,

1ft. For uncertainty; as a grant to two *hæredibus*, without *fuis*.

2d. When made on a corrupt contract.

3d. If made to defraud creditors of their debts, or purchafer of his lands.

4th. For want of fome other matter which ought to be done, as inrollment, attornment, &c.

And here we will fpeak a little of attornment.

It is as the agreement of the tenant to the grant of the feigniory or rent, or the agreement of the donee in tail, or tenant for life or years to the grant of the reverfion or remainder made to another; as when the lord, or one that hath rent out of the land, grant the feigniory or rent to another, or when the reverfioner or remainder-man after an eftate tail for life or years, fells or gives the reverfion or remainder; in thefe cafes the tenant of the land muft have notice of the gift or fale, and of the alteration of the party to whom he muft pay his fervices, and muft confent to the fame, elfe generally it is not good. Attornment.

Attornment is either actual or verbal; of which examples will enure.

The end and fruit of this attornment is to perfect a grant, and no rent or reverfion will pafs without it; neither can the grantee of the feigniory, or rent, bring an action of wafte for any wafte done in the land, nor diftrain for any rent or fervice upon that land before this is done: but this attornment, being but a bare affent, will not enure

to paſs any intereſt to make a bad grant good, nor to give a man a tenancy by diſſeiſin, abatement, intruſion, &c. nor will it work by way of eſtoppel, but it doth effectually paſs the freehold and inheritance of the reverſion of land when the grant is good, as a feoffment and livery and ſeiſin do paſs the poſſeſſion of land: but a tenant may ſometimes be compelled to attorn, as conuſee upon a fine may do it by a *per quæ ſervitia*, *quem redditu reddit*, or *quid juris clamat*, as the variety of different caſes may require.

THE attornment muſt always be made to the grantee himſelf, and it muſt regularly be made in the life-time of the grantor and grantee; elſe, generally, if either die before, the grant is void.

1ſt. THAT it be made by the perſon who ought to make it.

2d. THAT it be made to the perſon who ought to take it.

3d. THAT it muſt be in convenient time.

4th. THE tenant muſt uſually firſt have notice of the grant.

5th. IT muſt be done in the manner the law preſcribes.

IT may be by words or deeds, with writing or without; and any words writ or ſpoke by the tenant that do import an aſſent to the grant after notice given, whether in preſence or abſence of the grantee, will make a good attornment. As to ſay, "I do attorn or become tenant "to the grantee," or, "I agree to the grant," *aut ſimilia:* or if tenant after knowing of the grant do pay or deliver all or any part of his rent or ſervice at any time when the ſame is due to the grantee, or give any valuable thing in the name of attornment or ſeiſin of the rent, this is a good expreſs attornment. If the grant be made to ſeveral, and the tenant do attorn to one of them, this is good to all the reſt.

A GIFT

A GIFT imports no more than the transferring of the property of the thing from one to another; and it differs from feoffments, bargains and ſales, & *ſimilia*, becauſe they are for many or other valuable conſiderations; but this is mere free will of the party donor; and ſo this may be called a conveyance, or paſſing an eſtate of lands or tenements to another in tail, and whereon the word *dedi* is moſt commonly uſed*. GIFT.

OF BARGAIN AND SALE.

THE term ſignifies the transferring of a property from one to another for valuable conſideration; and when it is applied to lands, tenements, or hereditaments, it is called a deed of bargain and ſale. BARGAIN AND SALE.

THE effect of it is to transfer the property of the thing ſold from the bargainor to the bargainee, and this it will as effectually do as any kind of conveyance; all things grantable any other way may be transferred by this, except eſtovers & *ſimilia*.

* OPINION *of Sir* JEFFRY PALMER *on the Effect of the Words* "Give *and* Grant."

"I CONCEIVE that care ought to be taken in a conveyance, of what nature ſoever it be, that there be not therein the words *given* and *granted* (for they imply a general warranty, and ſhall not be qualified by ſpecial warranty following), as hath been of late thrice adjudged.

"GIVE implies a perſonal warranty, and ſo is not always uſed: the word *grant* in a leaſe for years is a covenant in law, or (as you may call it) a general warranty; if not qualified by a covenant or warranty in fact, then it is reſtrained to the words of the covenant ſubſequent.

"BUT in an eſtate of inheritance where the fee paſſeth, there the word *grant* is neither a covenant in law nor warranty; for if it ſhould be a covenant in law or warranty in itſelf, it would be there reſtrained and qualified by the warranty or covenant in fact.

"AND a deed to paſs an inheritance where common is, cannot be without it; for if it be common in groſs it cannot paſs by the livery, but muſt paſs by the word *grant*, and I never yet ſaw a feoffment without it.

"JEFFRY PALMER."

If an estate of freehold or inheritance is made of land by way of bargain and sale, it must be made by writing, or deed indented, and cannot be made by word of mouth only.

The words *bargain and sale* are not necessary to a bargain and sale, but words equivalent will do.

A valuable consideration must be given, at least said to be given, for the land; but livery and seisin, or attornment, is not needful; but when a freehold passeth, the deed must be inrolled: and here observe,

1st. That an inrollment of such a deed to make estate pass, must be on parchment.

2d. The deed inrolled must be indented, for it will not pass by deed poll.

3d. It must be inrolled within six months after the purchase or sale, and this account to be,

(1.) From the deed's date and not from the delivery of the deed.

(2.) After the rate of twenty-eight days to the month, and no more.

(3.) The day of the date to be taken exclusive, and for none of the days of the six months.

4th. If it be inrolled any part of the last day of the six months, it is sufficient.

Lease. A lease properly signifies a demise or letting of land, rent, or any hereditament to another for a less term than he who lets it hath in it; for when lessee for life or years grants over all his estate or term to another, this is more properly called an assignment than a lease. A lease is most commonly made by the words *demise*, *grant*, and *let*, though it may be made by others that are equivalent; and is most frequently made by writing in an indenture; and it may be for life of lessee or another, or both, or for a term of years.

1st. A lessor capacitated by law, and not forced to make the lease by duress, or the like

2d. A les-

2d. A LESSEE not disabled to receive it.

3d. A DEMISED thing that is demisable.

4th. IF the thing demised be not grantable without deed, as rents, &c. and the person who lets it is not able to grant without deed, as bodies corporate & *similia*, then it must be done by deed.

5th. IF it be a lease for years, it must have a certain commencement and a certain express determination.

6th. ALL needful ceremonies must be performed, as livery of seisin, attornment, &c. when the case requires.

7th. ACCEPTANCE of thing demised by the lessee.

LEASES for lives, years, or at will, may be made of any thing corporeal or incorporeal, that lies in livery or grant; and leases for years may be made of any goods or chattels.

TENANT in tail may make leases for three lives, or twenty-one years, but these conditions must be observed;

1st. SUCH lease must be made by indenture, and not by deed poll or parol.

2d. To begin from the day of making thereof, or to begin at Michaelmas next, & *similia*.

3d. IF an old lease of the land is in being, that must be surrendered or expired within one year of the time of making the new lease.

4th. THERE must not be a double or concurrent lease in being at the same time; as if a lease for four years be duly made, the reversioner cannot oust the lessee and make a new lease for life.

5th. THESE leases must not exceed three lives, or twenty-one years from the time of making the same.

6th. THEY must be of lands, tenements, or hereditaments, manurable or corporeal, which are proper to be let, and whereout a rent by law may be issued and reserved.

7th. OF

7th. Of land moſt commonly let to farm, or occupied by the farmers thereof for twenty years next before the leaſe made.

8th. There ſhall be reſerved on ſuch leaſes yearly, during the ſame leaſe, ſo much yearly rent as hath been accuſtomably paid for the lands, and payable to the leſſor and his heirs to whom the reverſion ſhall belong.

9th. They muſt not be without impeachment of waſte.

10th. They muſt not be againſt a ſpecial act of parliament.

11th. They muſt have all due ceremonies and circumſtances for the perfection of them, as livery of ſeiſin, &c.

All eccleſiaſtical bodies aggregate of many may not make leaſes of their lands for more than three lives, or twenty-one years.

Exchange. Exchange is a mutual grant of equal intereſt the one for the other, and is when two perſons are poſſeſſed of an equal eſtate, and give the one for the other; in which there is a double grant; for each grants that which is his for the other.

This conveyance is made by writing or without, but either way muſt be made by this word *exchange*, which is ſo appropriated to the thing that it cannot be deſcribed by any other.

The effect of it is to give the intereſt or property of the thing exchanged to either party, according to agreement.

If the exchange be of lands or tenements of any eſtate of inheritance or freehold by word or declaration, it hath a condition or warranty in law incident and annexed to it, viz. a condition to give an entry upon all the lands given in exchange, and a warranty to enable either party to vouch and recover in value ſo much of his own land again given in exchange, if he be put out of all or part of the land taken in exchange; yet this

this remedy goes only in privity, and ſhall not go to a ſtranger.

THESE things are requiſite to the perfection of an exchange:

1ſt. THAT the parties be able to give and take: ſuch who may be grantors and grantees may make an exchange.

2d. THE thing exchanged may be ſuch whereof an exchange may be made of things of the ſame nature, as a temporal thing for a temporal, a ſpiritual for a ſpiritual, a houſe for a houſe, land for land, &c.; and things of a different nature, as a houſe for land or rent, a chamber in a houſe for common or rent, &c.

3d. THE exchange muſt be in that order and manner as the law requires; and here note,

(1.) THAT if all or part of the thing whereof the exchange is made do lie in ſeveral counties, or lies in grant and not in livery, though in the ſame county, the exchange muſt be made by deed indented or writing.

(2.) THE word *exchange* muſt be had and uſed between the parties making the exchange.

(3.) IF any rent, reverſion, ſegniory, or the like, be granted by either party, the tenant muſt attorn to the grant.

4th. EQUALITY of the eſtate is neceſſary for either party to have alike kind of eſtate; ſo that if one's eſtate be in fee and the other in tail, &c. theſe exchanges are void.

5th. THE exchange muſt be executed and perfected by entry or claim in the life-time of the parties.

A SURRENDER, properly taken, is the yielding and delivering up of lands or tenements, and the eſtate a man hath therein, to another that hath a higher and greater eſtate therein. A Surrender.

1ſt. EXPRESS, or in deed; which is, when it is done by apt words and the expreſs agreement of the parties.

2d, IN

2d. In law, or implied; which is, when it is wrought by consequence and operation of law, or when the law doth interpret somewhat done to another intent, to enure to make a surrender of it.

In the first case it is by word only, or in writing; and when it is by writing it is called an Instrument, testifying by apt words that the particular tenant of the freehold lands or tenements for life or years do agree, that he that hath the next immediate remainder or reversion thereof shall have the particular estate in possession, and that he yield the same to him.

The effect of a surrender is, that it passeth by the estate of the surrenderor to the surrenderee, and that hereon the estate of the surrenderor to the surrenderee is drowned and extinct in the estate of the surrenderee.

A surrender in law is, when a lessee for life or years takes a new lease of the reversioner of the same thing in particular contained in the lease for life or years, this is a surrender in law of the first lease.

1st. That the surrenderor be a person able to grant and make, and the surrenderee capable to receive a surrender, and that both have estates capable of a surrender; and for this purpose,

(1.) That the surrenderor must have an estate in possession of the thing surrendered at the time of the surrender made,

(2.) The surrender must be to him who hath the next immediate estate in remainder or reversion.

(3.) That there be privity of estate between surrenderor and surrenderee.

(4.) That the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor hath,

(5.) That he hath the estate in his own right and not in his wife's,

(6.) That

(6.) THAT he be sole seised of the estate in remainder or reversion, and not in joint tenancy.

2d. THAT if it be made by word without writing, that it be made in the same county where the land to be surrendered doth lie.

3d. THAT it be made of such things whereof a surrender may be made; for a surrender cannot be made of lands in fee-simple, tail, nor of rights nor titles, but only of estates for life or years.

4th. THAT there be words, or deeds and words, sufficient to make the mind of the surrenderor known, and that he is willing to give up the estate to the surrenderee. And note, that the words *surrender*, *give and grant*, *&c.* are the most significant and proper words whereby to make a surrender; yet any other that do sufficiently declare the will and assent of the surrenderor will do.

5th. THE surrenderee must agree to accept of it, for till then the surrender is not perfect.

IF any kind of tenant for life enfeoffs the remainder-man, or the reversioner of the land that shall enure as a surrender; or if lessee for life or years grants his estate to the reversioner or remainder-man, and a stranger, that shall enure as a surrender for two, and a grant of the other; or if tenant for life or years, and reversion or remainder-man, by word, without deed, join in a feoffment, it is the surrender of the tenant for life or years, and the feoffment of the reversioner or remainder-man.

THERE may be also a surrender of a rent in fee-simple for life or years, issuing out of another man's manor or lands; and it may be done by delivering the deed of the grant of the rent to be cancelled, to any one that hath an estate of the manor or lands in fee-simple for life or years in possession or remainder, and whereby the estate is extinct and gone.

A CON-

CONFIRMATION.

A CONFIRMATION is a conveyance of an estate or right that one hath unto lands or tenements, to another who hath possession thereof, or some estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. This conveyance is most commonly or properly made by the words *confirm*, *ratify*, and *approve*; though it may be done by other words that are equivalent, as *dedi & concessi, & similia*.

CONFIRMATIONS are,

1st. IMPLIED, or in law; which is, when the law makes a construction of a deed made for another purpose to be a confirmation.

2d. IN deed, or express; which is, when the act done or deed made is intended for a confirmation; and both these must be in writing; and the latter is properly called a confirmation.

A CONFIRMATION may be distinguished likewise by its effects. Sometimes it serves to make good a wrongful or defeasible estate, or to make a conditional one absolute, and then it is *confirmatio perficiens*: sometimes it serves to increase or enlarge a rightful estate, and so passeth an interest, and it is called *confirmatio crescens*: sometimes it serves to diminish and abridge the services whereby the tenant doth hold, then it is called *confirmatio diminuens*.

THE operation of it, where it finds a foundation to work upon, is either to increase and enlarge the estate of him to whom it is made from a less to a greater, or to corroborate and perfect the estate upon condition to an absolute estate that was imperfect before, or change the quality of it from an estate upon condition to an absolute estate, or to extinguish rights and titles of entry, but will not make an estate good that is merely void.

THERE is requisite to every good confirmation tending to confirm an estate or alter its quality, that,

1st. THERE must be good and capable parties, and a thing

thing to be confirmed, as in other grants and deeds, and the deed muſt be well ſealed, &c.

2d. THERE muſt be a precedent rightful or wrongful eſtate in him to whom the confirmation is made; at leaſt he muſt have poſſeſſion of the thing confirmed, elſe there is no foundation for the confirmation to work upon.

3d. THE confirmer muſt have ſuch an eſtate and property in the thing whereof the confirmation is made, as that he may be thereby enabled to confirm the eſtate, elſe the confirmation is void; as if the heir of diſſeiſee during the life of diſſeiſſee confirm to the diſſeiſor, this is no confirmation.

4th. THE precedent eſtate muſt continue till the confirmation is come; as in all caſes of voidable eſtates the confirmation muſt be before the eſtate be made void by entry.

5th. THE eſtate precedent, and that which is to be confirmed, muſt be lawful, and not prohibited by any act of parliament; therefore if a ſpiritual perſon make a leaſe not warranted by the ſtatutes, as prebend or the like, the confirmation of the dean and chapter will not help to amend it.

6th. THERE muſt be apt words in the deed or inſtrument the moſt proper for the purpoſe, as before mentioned.

CONFIRMATIO *creſcens* muſt have the requiſites of the former, but there muſt be alſo in that caſe a privity between the confirmer and the confirmee: there needs no new rules for the *confirmatio diminuens.*

OF RELEASE.

A RELEASE is the giving or diſcharging of the right of action which a man hath or may have or claim againſt another, or that which is his; or it is the conveyance of a man's intereſt or right which he hath to a thing to another that hath poſſeſſion thereof, or ſome eſtate therein. Release.

THE

THE words most proper and frequently used in this conveyance are, *remisi*, *relaxavi*, and *quietum clamavi*.

A RELEASE is expreſs, or in deed, which is a purpoſed releaſe; which is, when the act done or deed made is intended a releaſe; and this is always done by writing; and then is defined by ſome an inſtrument, whereby eſtates, rights, titles, actions, &c. be extinguiſhed, transferred, abridged, or enlarged.

A RELEASE implied, or in law, is, when the law by conſtruction and by way of conſequence makes a releaſe of an act done to another purpoſe.

A RELEASE is much of the nature of a confirmation, for in moſt things they agree and produce the like effect.

A RELEASE enures ſometimes by way of *mitter le eſtate*, *(i. e.)* giving, transferring, or diſcharging a right, title, or entry to him to whom it is made: ſo it perfects an eſtate that was imperfect before, and ſometimes makes a conditional eſtate abſolute,

BY way of extinguiſhment:

BY way of abridgement.

LANDS, tenements, and hereditaments may be given and transferred by way of releaſe, and all rights and titles to lands may be given, bound, and diſcharged, by releaſe; ſo may rights and titles to lands, goods, and chattels, and all actions real, perſonal, and mixed, be given, diſcharged, and extinct by releaſe, provided,

1ſt. THAT the parties be capacitated and the thing qualified duly that is to be releaſed.

2d. THAT the deed be well ſealed and delivered, &c.

IF the releaſe enure by way of enlarging the eſtate, then it is requiſite,

1ſt. THAT he who makes it have at the time of the releaſe made, ſuch an eſtate in himſelf as out of it ſuch an eſtate may be derived to the releaſee as is intended by the releaſe.

2d. IN caſe of a releaſe of a bare right of a freehold in the land, the releaſee muſt, at the time of making it, have

the freehold in deed or in law in poſſeſſion, or ſome eſtate in remainder or reverſion in deed, and not in right only in fee ſimple, tail, or for life, of the land releaſed.

3d. THERE generally needs no priority to make the eſtate good, in caſe of a releaſe of a bare right to him who hath a freehold eſtate in deed or in law.

4th. WORDS that enure to make a good releaſe that enures by way of enlarging, will make a good one in theſe caſes.

NATURE OF A DEVISE OR TESTAMENT.

A TESTAMENT is a full and complete declaration of a man's mind, or laſt will, of what he would have to be done after his death. A teſtament is, properly, when an executor is named in it; but when there is no executor, then it is a codicil; and a man can make but one teſtament that ſhall take effect; but he may make as many codicils as he will. DEVISE OR TESTAMENT. Shep. Touch. 399.

TESTAMENTS are in writing, or by word without writing. The firſt is what the teſtator by himſelf, or ſome other by his appointment, puts in writing; the latter is when a man, being very ill, is obliged to call a friend or neighbour to bear witneſs of his laſt will, and then he preſently declares the ſame before them; this is called a nuncupative or nuncupatory will.

EVERY complete teſtament hath two parts:

1ſt. THE making deviſes, or giving legacies:

2d. THE ordaining an executor; for a teſtament can be no more without, than a codicil can be with, an executor.

A DEVISE or legacy is, when a man in his teſtament doth give any thing to another: the firſt is applied to the gift of lands; the laſt, to the gift of goods or chattels.

AN executor in a large ſenſe is taken for any one that is appointed to have the diſpoſition and ordering the goods of the deceaſed.

THERE are three kinds of executors:

1st. A LEGE *constitutus*. Such is the ordinary of the diocese, who hath ordinary jurisdiction in matters ecclesiastical.

2d. A TESTATORE *constitutus*; heretofore called *testamentarius*. He is strictly and properly an executor.

3d. AB *episcopo constitutus*; and he is called *dativus*. Such a one is an administrator, who hath the goods and chattels of a man dying intestate committed to his charge by the ordinary; and his power, benefit, and charge, is in all things equal to an executor.

A TESTAMENT differs much from other acts and deeds which men do and execute in their life-time; for though it be made, sealed, and published, in never so solemn a manner, yet it hath no life nor virtue till the testator's death; therefore a man may alter and make void his will as often as he will, and may make as many testaments as he will, but the latter always revokes the former: otherwise of a codicil, for one may make as many of these as he will, and no testament at all: or if he makes a testament, he may still make as many of these as he will, and not overthrow the one or the other; for in the first case they must be annexed to the letters of administration, and the administrator must perform them; and in the latter they must be all annexed to the testament, and the executor must perform them.

1st. A FEME covert, unless in special cases, cannot make a testament:

2d. NOR an infant under the age of twenty-one years of his lands; but of his goods and chattels he may make a testament at fourteen, and not before. *A.* is born the first of February; and the last of January at one o'clock in the morning, twenty-one years of age, makes his will of land; it is a good will, for he was then of age, *per* Holt. 1. Salk. 44.

3d. NOR a lunatic nor a madman during infanity of mind.

4th. NOR

4th. Nor an ideot, nor deaf or dumb person.

5th. A traitor or felon attainted or convicted cannot make a testament of their lands or goods, because they are forfeited to the king:

Nor an outlawed person, so long as his outlawry stands in force.

2d. He who makes it must, at the time of making it, have *animum testandi*, (*i. e.*) a firm resolution and advised determination to make a testament; otherwise the testament will be void.

3d. That the testator's mind in making it be free, and not moved by fear, fraud, or flattery.

4th. That the form and order prescribed by the law be observed in the disposition.

And therefore note,

1st. That there be an executor named, and that he be capable of the executorship.

2d. If it be of land, it must be in writing; and it must be committed in writing at the time of making thereof, and not after the testator's death.

3d. Lands devisable by custom, and goods and chattels, may be disposed of by words without writing.

4th. It is no matter on what paper or parchment, or in what language it is made.

5th. Where writing is needful, the sealing the testament, or subscribing the testator's name, is not necessary.

6th. If the testator be taken off by sudden death in the middle of making his will, it seems, the whole will is void.

7th. If the testament be good in all its requisites, it must be proved for all; and if it cannot by proof be made appear that it is the testator's testament, it is void.

And therefore note,

1st. That a nuncupative will must be proved by two witnesses at least.

 2d. A

2d. A WRITTEN teſtament, if written by the teſtator's hand, proves itſelf without the help of witneſſes.

3d. IF it be proved the teſtator ſaid his teſtament was in ſuch a ſchedule in the hands of *J. S.* and ſaid *J. S.* produce a writing depoſing it to be the ſame, this is a ſufficient proof.

4th. IF the witneſs produced proves the writing produced to be the laſt will, or that he ſaid it was or ſhould be his laſt will, that is ſufficient proof.

5th. ALL perſons of any ſex or quality are competent witneſſes to a will, if they be not infamous or perjured.

6th. WHERE there is no oppoſition or queſtion moved againſt the teſtator, the executor's oath alone is ſufficient proof.

A TESTAMENT good in creation may be void by divers means.

1ſt. BY countermand, or revocation: and for that obſerve, that any act or thing done, or words ſpoken by the teſtator, after teſtament made, that doth alter or croſs all or any part of his teſtament made before, is a revocation made of it, or at leaſt of that part ſo croſſed or altered: but when a teſtator makes two teſtaments, a former and a latter, both in writing, though the latter doth generally revoke the former, yet in theſe following caſes it doth not:

(1.) WHEN the latter is imperfect as to the forementioned requiſites.

(2.) WHEN the teſtator having made two teſtaments in writing, and both are preſented to him on his death-bed, and delivers the former to ſome of the ſtanders-by to be his laſt will and teſtament.

(3.) WHEN the latter doth in all things agree with the former.

(4.) WHEN in the latter there is no executor named, for then it is eſteemed but as a codicil or addition to the former.

2d. BY

2d. By cancelling, or other deſtruction of it; as when the teſtator himſelf, or ſome other by his appointment, cuts it in pieces, tears, or burns it.

3d. By alteration of the teſtator's eſtate, and when the teſtator after making it is convicted of treaſon or felony.

4th. By intention; as when the teſtator on his death-bed hath a mind to alter it, but his wife and ſome other will not ſuffer the notary and witneſs to come unto him.

5th. By making another of the ſame date, for it cannot be proved which of them was made firſt; the one will overthrow the other.

6th. By the declaration of the teſtator's mind; as if he have them by him, and declare the firſt ſhall ſtand.

The ſummary of the requiſites to render a teſtament good in creation are, therefore, as follow:

1. That there be a deviſor duly capacitated. [1]

2. A devisee capable to receive.

3. That the deviſor have, at the time of the deviſe made, *animum teſtandi*, and a mind to deviſe.

4. That the deviſor be free, and not drawn by fraud or flattery.

5. That the thing deviſed be deviſable.

6. That the deviſe be in due form and manner.

7. That it be deviſed on lawful terms and conditions.

8. That there be words ſufficient to make his mind known.

9. That it be proved after the perſon's death.

The executor before probate may releaſe and diſpoſe of the goods of his teſtator, and may bring actions and be ſued; but the will muſt be proved before he declares: he may receive and pay money, and it ſhall be good, though he dies before probate; and as all the teſtator's goods are in his actual poſſeſſion, he may maintain trover. 1. Salk. 307.

[1] Shep. Touch. 413.

10. If it be a devise of lands, the devisor must be sole seised of the land, and not joined with another.

As to these requisites, note,

1st. That whoever may make a testament may make a devise; and so who cannot do the one cannot do the other.

2d. Note (1.) That, regularly, whoever may be a grantee may be a devisee, or legatee.

(2.) If the devisee be capable to receive, he must certainly be named or described.

3d. That devisee must be capable by that name by which the devise is made to him; so if the devise be made to the heirs of *J. S.* *J. S.* being then alive, the devise is void.

4th. If the name be mistaken the devise is void.

5th. Note (1.) That lands devisable by custom may be devised by a nuncupative will.

(2.) The form of words in a devise is not regarded; so that "I say, I give, institute, and appoint or will, that "*J. S.* shall have my lands," is as good as "demise my "land to *J. S.*"

(3.) A man may devise lands and tenements in fee-simple, for a term of years.

(4.) A devise may be of lands, goods, or chattels, simply and absolutely, or conditionally.

(5.) A devise may be also by a limitation.

(6.) One seised of lands in fee-simple may devise that his executors may sell it.

(7.) Rent may be devised, or land reserving rent, with clause of distress.

(8.) A man may devise his lands to one, and a rent out of the same to another.

(9.) A man may devise his lands for so many years as *J. S.* shall name.

(10.) A man may devise a term of years by way of remainder.

(11.) A

(11.) A LEGACY of goods or chattels may be given to, from, or until a certain time. Note,

1ſt. THAT lands, tenements, or hereditaments, for the nature and quality of them, are deviſable as well as other things; but eſtates in fee were not ſo till 32. *H.* 8. which enabled the owners of lands held in ſoccage to deviſe all the lands; and thoſe lands that are held by knight's ſervice, the owners may deviſe two parts in three.

2d. IT doth not enable ſuch perſons to deviſe that are diſabled by law, either in reſpect of their perſons or mind.

3d. HEREDITAMENTS that are not of any yearly value, ſome of them are deviſable and ſome not; as if the king grants to one and his heirs fines and amercements in ſuch a manor and vill, in this caſe the owners cannot deviſe theſe things; but if one have a manor to which a waife, eſtray, leet, or the like, is appendant, there by the deviſe of the manor with the appurtenances they may paſs.

4th. SUCH uncertain franchiſes as before as are of no yearly value, though they are not deviſable, yet may reſtrain the deviſe of a man's land, and make it voidable for one-third part, if they be held *in capite.*

5th. IN all caſes where a man is reſtrained to deviſe any part of the land in ſoccage, he muſt have land held *in capite* at the ſame time.

6th. THE teſtator muſt have a ſole eſtate, as well in the lands he leaves to deſcend to the heir, as in the lands he deviſeth.

7th. THE eſtate of the land that is held muſt continue after death of tenant.

8th. THAT which a man cannot diſpoſe of by any act in his life-time, ſhall not be taken for any ſuch manor, &c. whereof a man may deviſe two parts by authority of ſtatute at his death.

9th. THE tenant by knight's ſervice muſt continue after teſtator's death.

10th. THE king or other lord muſt have a full and clear yearly value of the one-third left to deſcend.

11th. THE one-third left to deſcend to ſatisfy the king or other lord, muſt deſcend immediately, and he muſt not ſtay for it.

12th. THE one-third muſt be taken out of the teſtator's lands indifferently.

13th. A MAN muſt have a right and poſſeſſion of the land he deviſeth, or the deviſe is not good.

14th. A SEIGNIORY, rent, or the like, is deviſable as well as land.

15th. WHEN a man ſeiſed of a houſe in fee deviſeth that, he likewiſe deviſeth the incidents to it, unleſs excepted, as windows, doors, wainſcot, and the like.

16th. WHERE a man hath a uſe that remains at common law, he may deviſe that as well as any other thing.

17th. ALL manner of goods and chattels, real and perſonal, may be deviſed by will.

18th. THINGS in action, debts, and the like, are deviſable by will.

19th. EMBLEMENTS, (*i. e.*) corn ſown and growing on the man's ground at the time of his death, and which himſelf ſhould have reaped had he lived to harveſt, are deviſable.

20th. OBLIGATIONS and counterparts of leaſes are deviſable.

21ſt. GOODS and chattels which a man hath jointly with another, are not deviſable.

22d. ALL things before deviſable muſt be named when they are deviſed, elſe the deviſe is void.

As to terms and conditions of a deviſe, note, that if one deviſe any thing to wicked ends and purpoſes, or on wicked conditions, as to the end the deviſee ſhould kill a man, or the like, theſe are void. As to the reſt of the property of a good deviſe, ſee them before in the property of a good teſtament.

BUT

But if a man would settle his lands by devise, let him do it in his perfect memory; and by learned advice let the will be indented, and of two parts, and let him have one with a friend, that it be not suppressed after his death; let there be credible witnesses to it; let the whole will be written in one hand, and on one piece of paper or parchment, for fear of alteration; let the hand and seal of the devisor be set to it; and if it be in several parts, let his hand and seal, and the names of the witnesses, be to every part; and if there be any rasing or interlining, let there be a memorandum of it.

The general rules for the explanation of wills are these: Rules for Explanation of Wills.

They must have a favourable interpretation, and as near to the mind and intent of the testator as possible, so that it be not repugnant to law; as if lands are devised to one and his heirs female, they shall take it. Whatsoever words will pass in a deed will pass by the same words in a will, and the same words that will make a condition in a deed will make the same in a will. When any chattels, real or personal, are given to an executor by a will, the executor has an election given him by law to have or take it in the right of a legatee or as an executor.

Ordinary cannot refuse probate to an executor because he is an absconding person, for the testator has trusted him; nor can he insist on security, for he has a temporal right which he cannot sue for before probate. 1, Salk. 299.

When a devise of goods or chattels is well made, the assent of the executor is necessary to the perfection thereof; for till then the legatee may not meddle with the thing devised; but the agreement of the executor or administrator is not necessary in a devise of lands; and if there be many executors, the assent of any one is sufficient.

A per-

A PERSON that may make a testament, or devise his goods and chattels, may make an executor; and any person that may be a devisee or legatee may be an executor: but if an infant be made an executor, he cannot meddle with the administration of the goods till he be seventeen years of age.

A PERSON *non compos* cannot be an executor or administrator. An administrator becomes bankrupt; administration may be revoked, but administration shall not be granted to another, though the executor becomes bankrupt. 1. Salk. 36. 39.

THE most proper words to constitute and appoint an executor are, "I make *J. S.* my executor, or the executor of my will, &c." but an executor may be constituted by other words, or by implication; as if a man say, that he wills *J. S.* to be his general administrator, or administrator of all his goods and effects.

IN all cases where a man has any goods or chattels to administer, and he dies a natural or civil death, or dies intestate, *i. e.* dies either making no will or not appointing an executor, or a person capacitated to be an executor (yet administration shall be granted generally, and not *de bonis non cum testamento, &c.*), or dies before probate, or refuse administration; in all these cases, the ordinary may and ought to grant administration of the goods and chattels of the deceased to whom of right it does belong, according to his discretion.

IF an executor intermeddle and die before probate, though he make an executor, yet administration shall be granted generally, and not *de bonis non cum testamento annexo* of the first testator; but if he proves the will and after dies intestate, administration shall be granted *de bonis non.* 1. Salk. 99.

ADMINISTRATION. ADMINISTRATION is to be granted by the ordinary of the diocese where the party died, or, *sede vacante*, the dean and chapter, being guardians of the spiritualties; or

if

if the deceafed have *bona notabilia* at the time of his death, (*i. e.*) goods and chattels above five pounds in another diocefe, in this cafe the metropolitan or archbifhop of the diocefe where the party died, and not the ordinary of the peculiar diocefe, may grant the adminiftration. A peculiar has a right to grant adminiftration, and there is no peculiar but what has an ordinary. 1. Salk. 40.

A MAN dies inteftate without kindred; king grants adminiftration: this is allowed as a refpect fhewn the king; but the ordinary has a right to difpofe to pious ufes; and Henloe's cafe denied to be law. 1. Salk. 37.

IF a man has two houfes, the one in Canterbury, the other in York, but lives moftly at the one and but fometimes at the latter, he dies at the latter after a day or two ftay, adminiftration muft be in the latter. 1. Salk. 37.

BONA *notabilia* in two diocefes, adminiftration is by both the bifhops, and not a prerogative adminiftration; but if there be *bona notabilia* in two diocefes in *C.* and two in *D.* there muft be a prerogative adminiftration in both. 1. Salk. 39.

ADMINISTRATION granted in a wrong diocefe is not void, but voidable; and the acts of fuch adminiftration and difpofal of goods after citation till repeal, is good. 1. Salk. 38.

ADMINISTRATION muft be granted by writing under feal, and cannot be granted by word of mouth. If an executor die after he has proved the will, and made a teftament, and therein appointed an executor, that executor fhall be an executor to the firft teftator.

IF an executor or adminiftrator die before probate, though he makes an executor, yet adminiftration fhall be granted generally *de bonis non*; yet the acts of the firft executor are good. If firft executor dies inteftate after probate, adminiftration fhall be granted *de bonis non.* 1. Salk. 299.

AN

An executor or administrator may refuse the executorship or administratorship at his pleasure at any time before he has intermeddled with the estate of the deceased; and if he be sued as executor, he may answer, *ne unques* executor.

An executor cannot waive a term, for he must renounce the executorship *in toto* or not at all. 1. Salk. 297.

If there be many executors, and one refuse, but the rest prove the will, the refusing executor may act afterwards, if he will, and in any action with the rest he may be named executor; he may release a debt; and if he survives, no administration can be granted till he has again refused. 1. Salk. 307.

If an executor once intermeddles, he cannot afterwards refuse it. Two executors; the one proves the will, action brought in both their names. *Per Curiam*, He that did not prove may come in if he will, but cannot refuse during the life of his companion.

The executor or administrator shall have, by virtue of their office, all the chattels real and personal of the testator, as well those that are in possession as leases for years of land, rent, common, *aut similia*, grants of next advowsons, presentations, wardships, infants, &c. corn growing and cut, trees and grass cut, and cattle, money, plate, household stuff, & *similia*; as also things in action, as right and interest of executions upon judgments, statutes, obligations, causes of actions, & *similia*; and divers other things are said to be assets in their hands.

Office of Executor and Administrator. Shep. Touch. 476.

The duty and office of an executor or administrator in general, is to dispose of all the estate of the deceased wherewith he hath to do:

1. Truly, that is, not to convert any of it to his own use, but to the best advantage of the deceased; nor to labour by undue practices to hinder a creditor of his debt.

2. Law-

2. LAWFULLY; to pay debts and legacies in that manner the law requires.

3. DILIGENTLY; but particularly,

1. THE first thing an executor or administrator is to do after he has taken upon him the charge of administration is, after the goods of the deceased are laid up, to see his body interred according to his rank and quality; but they should be very careful not to exceed in funeral pomp, especially if the estate will scarcely reach to pay the debts; for be their expences what they will, the judges (who are to determine what should be allowed) allow in such cases a small matter; and what they lay out more they must bear themselves.

As *per* Holt, For strictness, no funeral expences are allowable against a creditor, except for cost in ringing the bell, parson, clerk, and bearers fees, but not for pall or ornamentals. 1. Salk. 296.

2. HE must make an inventory or schedule, containing a true and perfect description of all the goods and chattels of the deceased at the time of his decease.

3. To prove the will, if any.

4. To sell and make money of the goods and chattels, and receive the debts due to the deceased, and then to pay the debts and legacies; wherein they must be very cautious: and therefore observe, that all debts must be discharged before any legacy; and if there be not enough for both, any thing that is left for a legacy may be sold to pay debts, and the legatees can have no remedy. And in the paying of debts this decorum must be observed:

AMONG persons that are creditors, the executor and administrator shall be preferred, who may first deduct their own debts.

HOLT. If administration shall be committed to a creditor, and after repealed by next of kin, he shall retain against the rightful administrator. 1. Salk. 38.

2. AFTER them the king is to be preferred; and then,

3. DEBTS

3. DEBTS of common persons must be paid as follows:

1. THE debts due by record by any judgment had against the deceased in any judicial proceedings in any court of record.

To *scire facias* on a judgment defendant pleads *plene administravit*, not good on special demurrer, for against a judgment he ought to shew how he administered. 1. Salk. 296.

IF an executor confess judgment, &c. pending another action, and do not plead that judgment, this is a confession of assets, and he is for ever estopped to say the contrary; as also is a jury. 1. Salk. 310.

DEBT on judgment against an executor: this is no waiver of the lien, and does not postpone it to other judgments. 1. Salk. 80.

2. DEBTS due by statutes, and recognizances entered into by deceased.

3. DEBTS due by obligations, and penal and simple bills.

4. DEBTS due for rent upon leases of land, *aut similia*.

RENTS, whether created by parol or deed, are equal to one another, but not superior to debt by specialty, as bonds, &c. though equal; therefore an executor may plead payment of another against another, but in debt for rent he cannot plead that this is a bond debt, nor *vice versa*. 1. Salk. 326.

5. DEBTS due for servants wages or workmen.

6. DEBTS due on shop-books or verbal contracts; and among debts that are due and already to be paid, those that are first sued are to be first paid.

THE executor or administrator is to make an account: wherein, note, that the ordinary may, if he will, call the executor or administrator to an account concerning the goods and chattels of the deceased.

AN executor or administrator regularly shall charge others of any debts or duty due to the deceased, as the deceased

ceased himself might have done, and the same action the deceased might have had, the same for the most part the executor or administrator may have. But they cannot charge any one for a personal wrong done to the testator, for which damages only are to be recovered, as for beating or wounding the deceased, *aut similia*; for *actio personalis moritur cum persona*.

EXECUTOR brings error to reverse an attainder of high treason. Holt doubted; but the other three *contra*; the executor being privy, therefore good. 1. Salk. 295.

AN executor or administrator shall be charged by others as the deceased might have been in his life-time.

ALL the executors, though there be never so many, are in the eye of the law as one man, in which respect the law esteems things as done by or to them all; as payment of a debt to one, sale or gift to another, &c.

IF there be many executors, and the one refuse and the rest prove the will, the executor that refused may act afterwards if he will; and if he be a debtor to his testator, the debt is extinguished notwithstanding his refusal; and if he survive the rest, he may then act, and he may release any debt. 1. Salk. 307.

TWO executors; one proves the will; action brought in both their names as executors: Resolved, both have a right in them; and he that did not prove may come in when he pleases, but cannot refuse during the life of his companion.

A DEVASTAVIT in an executor or administrator, is when they misemploy the estate of the deceased, or misdemean themselves in the management thereof against the trust reposed in them. And it may be done divers ways;

1. BY bestowing too much on the funeral of the deceased. 1. Salk. 296.

2. BY paying legacies before the debts are discharged, and so there do not remain enough for the debts.

3. BY

3. By not paying the debts in the manner and order above prescribed.

4. By releasing a debt due to the deceased.

5. By selling the deceased's goods much under value; especially when it is to any relations, or for money; underhand: this is said to be waste in an executor or administrator; and when it is discovered, it renders them chargeable *de bonis propriis* for as much as is misemployed or wasted; but one executor or administrator shall not be charged for the waste of another.

Covenant to repair against an administrator: this is a covenant that runs with the lands, and binds the assignees; and the executor may be charged as *terre*-tenant, as in waste; and when he answers as assignee, judgment must be *de bonis propriis*; but when as executor, though in his time, it is *de bonis testatoris*. 1. Salk. 309.

An executor of his own wrong, is one who is neither lawful executor nor administrator, but that takes upon him to act as executor or administrator; as by the taking the goods of the deceased into his own possession, giving and selling them, and paying the deceased's debts, &c.

A man may make himself such a one;

1. By proving the will with the deceased's money.

2. By seizing, gaining, and keeping the deceased's goods as his own.

3. By delivering the goods of the deceased in satisfaction of theirs, or by selling the deceased's goods to pay his debts.

4. By receiving any debt due to the deceased.

5. By releasing any debt due to the deceased.

6. By delivering any legacies.

7. By suing as executors for any debts due to the deceased.

8. By selling the deceased's lands.

And for as much as such an executor of his own wrong hath misemployed the deceased's goods, for so much is he chargeable, and no more.

ADMI-

ADMINISTRATION *durante minoritate* is, in case where an infant, under the age of seventeen years, is made an executor, and administration of the goods is committed to one or more of the next friends or friend during his minority, till he be seventeen years of age.

ADMINISTRATION *durante, &c.* of an administrator may act till the administrator be of the age of twenty-one, otherwise of administration *durante, &c.* of an executor, for there the executor may act as such at seventeen. 1. Salk. 39.

ADMINISTRATION *durante absentiâ J. S.* executor, or *pendente lite* good, but it must be beyond sea, and plaintiff must aver absence. 1. Salk. 42.

ADMINISTRATOR'S are generally made of the nearest friend; or if there be more than one that have equal pretensions, they may, if the ordinary think fit, be all made administrators.

INTESTATE without kindred the king may dispose of the administration; but of right it belongs to the ordinary to dispose of to pious uses. 1. Salk. 39.

ADMINISTRATION granted the grandmother, the aunt moved for a *mandamus*. Holt. In equal degree the spiritual court has election, and the grandmother is as near as the aunt; and the grandmother has the advantage, for she is *in lineâ rectâ*. 1. Salk. 38.

HUSBAND dies intestate, administration may be granted to the next of kin, or to the wife *(ut antea)*; but if wife dies, administration must be granted to the husband. Administration may be granted to the wife *quoad* part, and to the brother for the rest, but not of an entire thing, as a bond. 1. Salk. 36.

THE ordinary, after he has granted administration, cannot revoke it without cause.

ADMINISTRATOR becomes bankrupt, or *non compos*, it may be repealed; otherwise, if an executor becomes

bankrupt no adminiſtration ſhall be granted; but if *non compos*, adminiſtration may be granted.

ASSETS are alſo all thoſe goods and chattels, actions and commodities which were the deceaſed's in right of action or poſſeſſion as his own, and ſo continued to the time of his death; and which, after death, the executor or adminiſtrator gets into his hands as duly belonging to him in right of his executorſhip or adminiſtratorſhip; and theſe are aſſets in their hands to make them chargeable for ſo much to the creditors and legatees: and here obſerve,

1. THAT aſſets in one executor's hands is ſaid to be aſſets in all their hands.

2. THAT aſſets in any part of the world are ſaid to be aſſets in every part.

3. ALL goods and chattels of what nature ſoever that are valuable, ſhall be eſteemed aſſets.

4. ALL goods or chattels in action or poſſibility at the deceaſed's death, if they come into the executors or adminiſtrators hands, ſhall be eſteemed aſſets, if recovered in right of the deceaſed.

PROBATE of a teſtament is producing it before an eccleſiaſtical court and judge who has power to take the ſame; and this is done either by oath of the executor himſelf, or by witneſs or other proceſs to confirm the ſame.

THE ordinary cannot inſiſt on ſecurity from executor. 1. Salk. 299.

EXECUTOR cannot ſue before probate.

IF executor delays probate, the ordinary, by proceſs, may compel him to come in, and either to accept or refuſe the executorſhip.

MANDAMUS iſſued to grant probate, though the ordinary returned the party an abſconding perſon, for the teſtator has truſted him firſt. 1. Salk. 299.

BUT

But thus much shall suffice for testaments and devises.

USES.

A use is the profit or benefit of lands or tenements, or the equity and honesty to hold the land *in conscientiâ boni viri*.

A use is either,

1. Express; as a feoffment to *J. S. to the use* of *W. S.* their heirs, &c. or,

2. Implied; as if a fine be levied, a recovery suffered, or a feoffment made, without any consideration or declaration of the use, it then results to the conusor, recoveree, or feoffor, by an implication of law.

A use is also *in esse*,

1. As in possession, reversion, or remainder.

Or, in *posse*,

1. As a limitation of a use to one for life, remainder to the use of his first son that shall be.

A use at common law was but a mere confidence or trust, collateral to and distinct from the land annexed in privity to the estate, and to the person touching the land, and had two inseparable incidents, viz.

1. Confidence in the person, and

2. Privity in the estate.

Uses were first introduced when men knew their own property from that of another; for then they had two things, a possession of the land and a power to take the profits; the latter of which, when separated from the former, was the *use*. By reason of uses, men were enabled to dispose of their lands by will; and they were first turned into abuse during the wars between the houses of York and Lancaster[1]. Uses served to defraud people of their just and reasonable rights, as appears by the several statutes respecting them.

[1] *Vide* Sand. on Uses, 8. to 26. as to their origin and causes of introduction.

To remedy these mischiefs the statute 27. *H.* 8. c. 10. was enacted, which transfers the possession to the use; and in the construction of this statute four things are requisite:

1. THAT there be a person seised.

2. THAT there be a *cestui que use in esse.*

3. THAT there be a use *in esse*, in possession or reversion.

4. THAT the estate out of which the uses do arise be vested in *cestui que use:* and uses which have not these four requisites are still merely trusts in equity.

To make a good use within the statute, care must be had,

1st. IN respect to the raising and creating it.

AND uses are raised either by transmutation of the estate, by feoffment, fine, or recovery: or,

OUT of the estate of the owner; as by bargain and sale, or covenant to stand seised: and,

IT may be raised out of a lease *for life*[2]: and,

BY parol without deed in writing: or,

BY a *devise* to one to the use of *J. S.*

[2] *Contra* before the stat. and *vide* Sand. 59. 140.

2d. IN respect to the persons trusted.

NEITHER the king nor any body corporate, aliens born, nor persons attainted, can be seised to uses; and the same law is with respect to disseisors, abators, intrudors, lords of villains, &c.

3d. IN respect to *cestui que use.*

AND persons who are capable o taking an estate in the land, are capable of taking the same by way of use.

4th. IN respect to the estate and possession of the person who creates the use; and therefore,

A COVENANT to stand seised, or bargain and sale in fee by tenant in tail only, passes a discendible freehold during the life of the tenant in tail;

AND a termor for years cannot create a use out of his term, so as to be executed by the statute 27. *H.* 8. c. 10[4].

[4] Whether a term for years is within stat. 1. *R.* 3. *Vide* Sand. 42. to 91.

5th. IN respect of the estate and possession of him that doth take by the conveyance; and therefore,

A TE-

A TENANT in fee or for life may ſtand ſeiſed to uſes, but upon a gift in tail to the uſe of another the uſe is void [s].

A USE could not ariſe out of the eſtate of *ceſtui que uſe*, nor out of the eſtate of a leſſee for years.

6th. IN reſpect to the conſideration.

ON fines, recoveries and feoffments, there muſt be either a conſideration or declaration.

ON bargains and ſales, and covenants to ſtand ſeiſed, the *conſideration* is abſolutely neceſſary.

USES may be averred.

AND when the deed is inrolled, it ſhall take effect as from the beginning by relation, to avoid all intervenient eſtates and charges whatſoever.

THE conſideration of kindred blood or marriage will raiſe uſes on a covenant to ſtand ſeiſed.

COVENANT in conſideration of money will not raiſe a uſe without inrolment.

7th. IN reſpect to the words uſed in raiſing uſes.

IF one *bargain and ſell* to his *ſon*, no uſe will ariſe unleſs money be paid and the deed inrolled.

SO if, in conſideration of money, one grants land to his ſon by the word *enfeoff*, no uſe will ariſe till *livery* is made.

8th. IN reſpect of the nature and quality of the uſe.

LANDS may be given to *charitable* uſes, but not to *ſuperſtitious* uſes.

DECLARATION of uſes.

1. USES may be declared on a fine, feoffment, or recovery, but not on a bargain or ſale, or covenant to ſtand ſeiſed.

2. EVERY one may declare the uſe according to the eſtate which he hath in the lands.

THEREFORE if huſband ſeiſed *jure uxoris*, and his wife

[s] Whether a tenant in tail or for life might have ſtood ſeiſed to a uſe *before* the ſtat. Sand. 59.? or, Whether *ſince* the ſtat. *ibid.* 143. to 154.

wife levy a fine, the husband alone may declare the uses, but not if she dissent to such declaration.

JOINT-TENANTS may each declare the use according his estate.

IF an infant, or a man of *non sanæ memoriæ*, declare the use of a fine, it shall bind him so long as the fine continues in force.

3. USES may be declared by deed indented, or by deed poll.

4. USES may be declared before or after the making of the assurance.

AND where the declaration of the use is precedent to the indenture, which is afterwards made accordingly, there no averment can be taken.

BUT where the declaration of the use is subsequent to the assurance, there an averment may be taken.

5. WHERE the limitation of the use is precedent, it is but directory, and doth not bind the estate until the assurance is made.

6. THE declaration of uses must be certain,

1st. IN the persons to whom,

2d. IN the lands of which,

3d. AND in the estates by which the uses are declared.

7. IF a fine is levied, or recovery suffered, pursuant to a precedent declaration of the uses, and such declaration is not pursued in the circumstances of time, person, quantity, or the like, then an averment without writing may be taken.

AVERMENT of uses.

WHERE any use is expressed upon a charter of feoffment, no other use can be averred.

BUT on fines and recoveries, when no uses are expressed, other uses may be averred besides those which the law would imply.

OF uses by construction of law.

IF

If a fine be levied, recovery suffered, or feoffment made, without any consideration or declaration of the use; the use, by construction of law, will be in the conusor, recoveree, or feoffor.

If a man make a feoffment to the intent to perform his last will, &c. the use shall be in the feoffor and his heirs, while he lives to dispose of it.

If a feoffment be made to *J. S.* and his heirs, to the use of *W.* for twenty years, the residue of the use after the twenty years, will result to the feoffor and his heirs.

And the use will result according to the estate which the parties had in the land; as if two joint-tenants, the one in fee-simple, the other for life, levy a fine without any consideration or declaration of the use, the use will result to the one in fee, and to the other for life; *& sic de similibus.*

The *limitation* of uses shall be according to the rules of the common law.

The extinguishment of uses.

Contingent uses may be extinguished or suspended by a feoffment.

And when the estate out of which the uses do arise is gone, the uses are also gone.

Revocation of uses.

Provisoes and powers of revocation of uses are frequent in voluntary conveyances to uses.

But in case of a feoffment, or other conveyance, whereby the feoffee or grantee is in by the common law, as where *A.* enfeoffs *B.* and his heirs to the use of *B.* and his heirs, a power of revocation reserved upon such a feoffment is void.

Revocations are favourably interpreted; and therefore a person may revoke part at one time and part at another.

New uses may be limited by the same conveyance by which the old uses are revoked.

All

All the requisites contained in the proviso (such as sealing, subscription of names, witnesses, &c.), must be punctually observed in the revocation.

When a covenantor makes void uses by virtue of a power of revocation, he is seised of the fee-simple without entry or claim.

Powers of revocation may be extinguished by a fine or feoffment.

Powers may also be destroyed by a release by the person to whom the power is reserved, to one who has an estate of freehold in the lands in possession, reversion, or remainder; or they may be destroyed by a defeasance.

Trusts not executed by the statute.

As a conveyance in trust to convey, &c.

Money delivered to a friend in trust to purchase lands, to the end that he may have the profits, &c.

A purchase of lands in the names of the purchasor and *A. B.* and their heirs (to prevent dower); but as to the estate of *A. B.* and his heirs in trust for the purchaser.

A grant of leases for years, or goods and chattels, in trust for the grantor.

An obligation or statute made to *A. B.* to the use of *C. D.*

* The Law of Uses is much illustrated by the Notes added by the Editor of *The Touchstone of Common Assurances*; as also by the very elaborate Opinion of Mr. Booth, which he has inserted under the Chapter of Uses at the end of that work; and which, with some additional learning on that subject, is also extant in our former volume, page 421. The *Law of Uses and Trusts* is also more fully treated of in a late publication, which is occasionally quoted in the margin of the present Tract, entitled, *Essay on the Nature and Laws of Uses and Trusts*, by F. W. Sanders, Esq.



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* It was thought unnecessary, in this publication, to enumerate the law books published from an earlier period, that purpose being already answered in a publication entitled BIBLIOTHECA LEGUM ANGLIÆ, which contains a methodical catalogue of all our law books, down to the above-mentioned period.

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"in

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concur

concur to distinguish this as the most valuable book in the English lawyer's library.

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The republication of this work, to consist of twenty-four volumes, is, we are informed, in such degree of forwardness, as to enable the proprietors to engage for the publication of two additional volumes every succeeding term, and even to promise four volumes every term towards the conclusion of the work; by which means it will be completed in considerably less time than originally proposed, which cannot but prove desirable in an undertaking of this nature. The Subscription continues open till further notice is given by the Proprietors.

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On the Subject of the Paper inserted in our last Number entitled THE OPTION, *which contains much curious Learning on a Topic peculiarly interesting to some of our Readers, we have received Information that an Answer, drawn up by an eminent Counsel of that Day, was printed, though not made public; we shall therefore feel ourselves much indebted to any of our Correspondents who can point out where that Piece may be met with.*

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